85-1137

NO.

Supreme Court, U.S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

CECILIA ELSTON, ET AL.
Petitioners

versus

BOARD OF LEVEE COMMISSIONERS
OF THE ORLEANS LEVEE DISTRICT
OF THE STATE OF LOUISIANA, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEAL STATE OF LOUISIANA

VOLUME I

JOHN H. BROOKS
847 3rd Street
Gretna, Louisiana 70053
(504)362-6272

PETER C. LADART
1112 Fifth Street
Gretna, Louisiana 70053
(504)361-5741

BARHAM & CHURCHILL
MACK E. BARHAM
COUNSEL OF RECORD
A Professional Law Corporation
400 Lafayette Street, Suite 300
New Orleans, Louisiana 70130
(504)523-3565

ATTORNEYS FOR PLAINTIFFS-
PETITIONERS

QUESTIONS PRESENTED

WHETHER a State may constitutionally wrest title to real property from private citizens on the sole basis of a period of bad faith adverse possession, in the absence of compensation or due process of law, and within a legal system which prohibits private citizens from taking title from the State on the same possessory grounds.

WHETHER the domestic law of a State may operate so as to divest and adversely dispose of a title to real property which stands in the name of the United States and, with reference to which, the United States is the owner of registry and record.

WHETHER controlling Federal law may be ignored, in the face of Art. VI of the United States Constitution, in disposing of title rights guaranteed by treaties of the United States and required to be respected by both the Constitution and laws of the United States.

WHETHER the title at bar arises under a treaty or the Acts of Congress in relation to public lands or by reason of the acts of officers of the Land Department of the United States.

PARTIES AT BAR

Parties Plaintiff

1. The heirs of Hubert Burat (Buras), certified as a class. Class representatives are Cecilia Elston, Rita Merritt, Edgar Ansardi, and Ernest Buras, Jr.

Parties Defendant

1. The Board of Levee Commissioners of the Orleans Levee District of the State of Louisiana
2. Chevron U.S.A., Incorporated
3. Chevron Pipeline Company
4. Gulf Refining Company
5. Louisiana Power and Light, Incorporated
6. Shell Oil Company
7. Estate of William G. Helis, and Helis Enterprises, Incorporated

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

SUCCESSION OF HUBERT BURAT (BURAS),
Plaintiffs-Petitioners

versus

THE BOARD OF LEVEE COMMISSIONERS
OF THE ORLEANS LEVEE DISTRICT
OF THE STATE OF LOUISIANA, ET AL.,
Defendants-Respondents

APPEAL AND PETITION FOR WRIT OF CERTIORARI

The heirs of Hubert Burat, certified as a class, appeal and petition for writs of certiorari and review directed to the Supreme Court of the State of Louisiana from a decision entered in this case on October 4, 1985 by that Court.

OPINIONS BELOW

1. A ruling of the 25th Judicial District Court, Parish of Plaquemines, State of Louisiana dated June 16, 1983, Case No. 14-706.

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2. A ruling of the Fourth Circuit Court of Appeals of the State of Louisiana styled and cited as Succession of Burat (Buras) v. The Board of Levee Commissioners, et al., 469 So.2d 1022 (La.App. 4th Cir., 1985), reh'g. denied, May 29, 1985.

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3. A ruling of the Supreme Court of the State of Louisiana declining to review the decision cited in paragraph two styled and cited as Succession of Hubert Burat (Buras) v. Board of Levee Commissioners, et al., 475 So.2d 1095 (La. 1985), Docket No. 85-C-1311.

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STATEMENT OF JURISDICTION

This appeal and application for certiorari is made pursuant to 28 U.S. Code, Sections 1257(1) (2) and (3). Review is prayed for from a decision of the Supreme Court of the State of Louisiana dated and entered on October 4, 1985 and styled and reported as Succession of Hubert Burat (Buras) v. Board of Levee Commissioners of Orleans Levee District, et al., 475 So.2d 1095 (La. 1985), Docket No. 80-C-1311.

SPECIAL REFERENCE is made to Rule 17.1.(b) of the Rules of this Court inasmuch as the ruling of the Supreme Court of Louisiana stands in conflict with the decisions of other courts of last resort in other states of the United States.

SPECIAL REFERENCE is also made to the denial of due process and equal protection inherent in the taking of land at bar.

SPECIAL REFERENCE is further made to the infringement of the plenary power of the United States over lands within its public domain.

FINAL AND SPECIAL REFERENCE is made to the principle that the Supreme Court of the United States has and should exercise jurisdiction by appeal to review the supreme court of a state in cases in which the matter arises under a treaty or the acts of Congress in relation to the public lands or where the case turns upon the actions of land officers of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V;

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1;

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Article IV, Section 3, Clause 2;

Section 3, Clause 2. Public Lands.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

United States Constitution Article VI, Clause 2;

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

TREATIES INVOLVED

The Louisiana Purchase and ancillary treaties of 1803;

TREATY, Between the United States of America and the French Republic, April 30, 1803, Art. II and III (8 Stat. 200).

* * *

Art. II. In the cession made by the preceding article are included the adjacent islands belonging to Louisiana, all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private property.--The archives, papers, and documents, relative to the domain and sovereignty of Louisiana, and its dependences, will be left in the possession of the commissaries of the United States, and copies will be afterwards given in due form to the magistrates and municipal officers, of such of the said papers and documents as may be necessary to them.

Art. III. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.

FEDERAL STATUTORY PROVISIONS INVOLVED

Act of Congress, March 26, 1804 (2 Stat. 283); Appendix page 37

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Act of Congress No. 852, July 6, 1842 (5 Stat. 491); Appendix page 51

Act of Congress, June 2, 1858 (11 Stat. 249); Appendix page 52

Act of Congress, February 28, 1859 (11 Stat. 387) Appendix page 53

LOUISIANA STATUTORY PROVISIONS INVOLVED

La.Rev.Stat. 38:295.

Sec. 295. Acquisitive Prescription Shall Not Run Against Levee Districts.

The prescription by which the ownership of property is acquired as defined by Article 3458 of the Louisiana Civil Code shall not run against any Levee District of the State or against the Board of Commissioners of any Levee District.

STATEMENT OF THE CASE

The plaintiffs, Cecilia Elston, Rita Merritt, Edgar Ansandi, and Ernest Buras, Jr., represent a certified class comprised of the heirs of Hubert Burat or Buras, a first generation Louisiana pioneer. His parents had come to Louisiana from Nova Scotia in one of the earliest migrations and were already there when Hubert was born in 1772.

In 1795, Burat became an actual settler on the lands at bar, lands which lie along the East Bank of the Mississippi River and which were then known as the "Batture du Diable." The land was a poorly defined swamp invested periodically by floods, hurricanes, mosquitoes and disease. New Orleans, in those days, was a six-day round trip by horse and civilization's only real outpost was a priest who ventured "down below" perhaps once a year to solemnize marriages, christen babies, and resolve quarrels.

Burat remained on this land until his death in 1847, a fact which is noted in the United States Census figures for 1810, 1820, 1830, and 1840. The possession of his heirs is also confirmed by census information stretching from 1850 through 1880.

He was on this land in 1803 when the United States purchased all of Louisiana. The purchase was by treaty, Articles II and III of which required and guaranteed that landhold rights in existence at the time of the purchase be honored and enforced. (La. Purchase Treaty; April 30, 1803; 8 Stat. 200).

Pursuant to these provisions, the United States agreed to recognize prior grants of land by the former sovereign. If those grants were complete and valid under the laws of that sovereign, the land did not enter into the public domain of the United States by virtue of the purchase. This was

true in every instance in which the United States extended its borders; it did not acquire title to land already given away or sold by the prior sovereign. However, the claim of Hubert Burat was not such a claim. Burat had acquired no ownership interest in the lands at issue as of the date of the Louisiana purchase, and thus the property fell into the public domain of the United States, to be divested solely by its own laws and acts and solely in the time, manner, and conditions of its choosing.

Congress, pursuant to the obligations of the purchase treaty, did, in fact, enact a series of statutes setting out procedures and conditions through which one could obtain a title from the United States. These conditions included possession, filing a claim, confirmation, survey of the land, and certain other pre-requisites.

Burat made first formal notice of his claim in 1820, but it was 1837 before supplemental

filings led to the acceptance of the claim by the land office and its presentation to the Congress. By then, although his claim was later confirmed by Congress, it was too late for Burat because the land had already been sold to pre-empters.

What had happened was that a survey commissioned by the United States in 1832 erroneously put the Burat estate in the wrong sections of land and correspondingly showed the actual Burat claim as vacant. Four sets of purchasers took advantage of the error and, pursuant to pre-emption statutes, they secured purchase certificates to the estate which comprises Sections 29, 30, 31 and 32 of Township 19 South, Range 16 East of the Mississippi River District. These sales took place in 1836, prior to the acceptance and submission of the Burat claim. Later in 1836 and in 1837, these certificates were sold to Andrew Hodge, a bona fide purchaser in good

faith. Hodge secured patents on the land in 1838 and 1839, divesting the United States of title long before the Congress considered the Burat claim.

Burat's claim, bearing number sixty, was not, in fact, confirmed by Congress until 1842 and then only by an act which specifically provided in Section 4 that "this Act shall amount only to a relinquishment on the part of the United States, and shall in no manner affect the rights of third persons (read Hodge)." [(5 Stat. 491); App. 51] Section 4 of the Act further provided that a patent would issue only after the "presentation to the Commissioner of the General Land Office of a plat of survey duly approved by the surveyor-general. . ." [App. 51.] No survey was approved until 1885, long after Burat's death. Note that not even so much as an equitable title could have therefore been given Burat by this confirmatory act. At best, he acquired an equitable right. For the distinction

between equitable title and equitable rights, see Johnson v. Wood, 138 Tex. 106; 157 S.W.2d 146 (1941).

Had this been the end of the matter, it would have been the end of the Burat claim. However, it was not. In 1861, the United States purchased Sections 29 and 32 back from the heirs of Andrew Hodge. The sale was accepted and a deed in favor of the United States was appropriately recorded in the conveyance office of Plaquemines (pronounced PLAK'-UH-MINS) Parish, Louisiana. This made the United States the owner of record of Sections 29 and 32. In that status, the United States remained until 1972 when the patent office finally issued a patent to the Burat heirs.

Following the issuance of those patents, the instant suit was filed. The Board of Levee Commissioners of the Orleans Levee District of the State of Louisiana ("Levee Board") and its various

lessees were named defendants because in 1925 the Levee Board had purported to acquire the lands patented to the Burat heirs. These acquisitions occurred pursuant to a legislative authorization granting to the Levee Board the jurisdiction to construct the proposed Bohemia Spillway. These acquisitions also occurred despite the fact that the Burat claim to the sections of land was filed of record in Plaquemines Parish, as was a 1861 reconveyance from Hodge to the United States.

The respondents-defendants excepted to the plaintiffs' demand with pleas of ten and thirty year acquisitive prescription (acquisition by bad faith possession), and with a plea of peremption based upon tax sales. Trial was had, and the defendants introduced evidence of their possession by way of affidavits. Live testimony was also elicited from some of the descendants of the pre-acquisition residents of the area.

The Honorable Julian Bailes, Judge Pro Tempore of the 25th Judicial District Court for the Parish of Plaquemines, Louisiana, rendered judgment for the defendants, sustaining their plea of thirty year acquisitive prescription, and dismissed the plaintiff's suit. In response to the argument that title to these lands was in the United States until 1972, and that prescription could not run against the United States, the trial court reasoned that the Burat claim had been satisfied as early as 1842, despite the fact that the United States Surveyor General for the District of Louisiana, as late as 1888, had termed the Burat claim "unsatisfied" and despite the fact that Burat's son was refused a patent. The trial court also found that there was no constitutional or statutory proscription against a public body acquiring property by prescription despite bad faith or lack of just title. Finally, the trial court adopted conclusory statements contained

in the defendants' trial memorandum to hold that sufficient evidence of thirty year possession had been introduced. (App. 24). The Burats appealed that judgment and the defendants answered that appeal. From a court of appeal affirmance of the lower court (App. 1), the Burats requested a rehearing which was denied on May 29, 1985 (App. 35). The Supreme Court of Louisiana denied writs on October 4, 1985, thus closing the matter in the courts of that State. (App. 36). From these adverse decisions, the Applicants respectfully petition this Court for relief.

The courts of Louisiana have thus wrongly and unjustly wrested this title from the class of the heirs of Burat in favor of a public body, the Levee Board, said to have acquired title by "squatter's rights," or by a bad faith possession.

The 30-year period required for such a title by domestic law extends through the periods

both prior to and after 1972 and thus includes periods in which both the United States and the Burats were owners of record. Further, the domestic law of Louisiana, in a blatant violation of equal protection, denies title by such possession in favor of private citizens as against the state.

The Burats received nothing by way of compensation.

The case, therefore, presents compelling and important constitutional dimensions. A state must not be permitted, by bad faith--i.e., no just title--to take, offering neither compensation nor due process in return. A state must not be permitted to take from private citizens when taking by those same the citizens is prohibited. A state must not be permitted to wrest title from the United States where the United States stands as the owner of record. Finally, a state must not be permitted to ignore the clear imperatives of the

laws of the United States in wresting land unto itself.

These questions were first raised in the courts of the United States. There, original jurisdiction was denied by the United States Court of Appeals for the Fifth Circuit on grounds that such jurisdiction was premature. The specific holding of the Fifth Circuit was that wrongful taking by bad faith possession and failure to honor the laws of the United States (in response to the Burat claim on the 1972 patent) were "anticipated defenses" and that "It is well settled that matters of defense anticipatorily urged do not create federal questions of jurisdiction." Heirs of Burat (Buras), et al. v. Board of Levee Commissioners of Orleans Levee District of the State of Louisiana, et al., 496 F.2d 1336 (5th Cir. 1974); reh'g den., cert. den., 42 L.Ed.2d 644, 419 U.S. 1049, 95 S.Ct. 625 (1974).

These anticipated defenses have now become a reality. They have been urged and wrongly accepted in the state district court, in the Louisiana state Court of Appeals for the Fourth Circuit and in the Louisiana Supreme Court.

This case has always, and does now, turn on the Constitution and laws of the United States. The entire body of constitutional and federal law relevant to the questions at bar has been both set aside and torn in its fabric by the decisions below. This is a wrong which only this high court can set right.

ARGUMENT:

REASONS WHY WRITS SHOULD BE GRANTED

1. WRITS SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE STATES AS TO WHETHER A STATE, ACTING AS A BAD FAITH SQUATTER, MAY TAKE LANDS FROM PRIVATE CITIZENS WITH NEITHER COMPENSATION NOR DUE PROCESS, SOLELY ON THE BASIS OF A PERIOD OF ADVERSE POSSESSION. THIS COURT SHOULD PROHIBIT SUCH PATENT VIOLATIONS OF PROPERTY RIGHTS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS.

THE BAD FAITH TAKING

The language of the law of Louisiana is rooted in the French Civil Code and is both colorful and unique. There, the concept of acquiring title to

land by a period of possession is called "acquisitive prescription" and a title so obtained is said "to prescribe."

Ten year acquisitive prescription is based upon good faith acquisitive possession with just title for a period of ten years. Thirty year acquisitive faith prescription is based upon bad faith possession, or possession without just title, for a period of thirty years.

Taking by bad faith possession is a unique concept. It is one of a very few precepts at law by which something of value can be taken by a person acting in bad faith, at the expense of another, without reference to considerations of fairness, equity, or compensation.

In the case of private persons, the law permits this kind of bad faith gain only to secure certain ends rooted in what is seen to be sound policy. As Oliver Wendell Holmes noted in his

treatise on The Common Law (1881), these interests lie in the securing of the productivity of the land and (on a note of hard Yankee realism) preserving peace in society.

These policies are entirely inapplicable to public bodies. The state generally keeps land out of commerce and rarely engages in feuds. Moreover, public bodies are chartered to serve. Indeed, trust and service are their essence. Enrichment of a public body at the expense of its citizens runs counter to this purpose--what it should protect, it destroys--what it should maintain, it takes. This is a basic wrong because a state, in fair constitutional terms, must possess for the people--never adversely.

This conclusion is expressed in the Fifth and Fourteenth Amendments. Bad faith prescriptive title by a state (acting as a squatter) strips the landowner of basic rights to compensation and to

due process which are patent on the face of these Amendments. It also strips such a landowner of his right to contest the public necessity and purpose of the possession. Nonetheless, it has been approved by the courts of Louisiana.

THE CONFLICT

The Supreme Court of Alaska has rejected this nonsense and ruled that a public body may not take land in this fashion. The relevant decision is Ault v. State, 688 P.2d 951 (Alaska, 1984). There, as here, the state claimed title by bad faith possession. Citing not only the Constitution of Alaska, but also the Fifth Amendment to the United States Constitution, the Supreme Court of Alaska held as follows:

> There is an obvious tension between the state's ability to acquire land by adverse possession and the constitutional prohibition against the state's

> taking private property without just compensation. Because of the prohibition, it is, in our view, appropriate to narrowly construe the circumstances under which the state may acquire property by adverse possession. In particular, as to state adverse possession claims under color of title, we believe that good faith should be defined as an honest and reasonable belief in the validity of the title. Whether these requirements are factually present in this case must be the subject of further proceedings in the superior court. (footnote omitted); Ault, supra at 956.

This not only recognizes the correct constitutional rule, but also brings this case directly within the purview of Rule 17.1.(b) of the Rules of this Court. The Rule provides that the Court will consider it a special and important reason for writs:

> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

Note also that the Alaska decision is not isolated. Inasmuch as the Levee Board has powers of expropriation, the plaintiffs interpret Sayre Land

Company v. Borough of Sayre, 384 Pa. 534, 121 A.2d 579 at 582 (Pa. 1956), as being to the same effect. There, the Supreme Court of Pennsylvania held that a "... borough has no more power to acquire land by adverse possession than has a railroad or any other company possessing the right of eminent domain." See also, In re Condemnation of Certain Ground in Prospect Park, 54 Municipal Law Reporter, 260 (1960), in which the court held that "A borough may not take land for public purposes by adverse possession but only by the exercise of eminent domain."

In sum, the Supreme Courts of the states are at odds on the requirements of the Fifth and Fourteenth Amendments in state seizures by bad faith possessions. This Court can, and should, settle this conflict in that "decent respect to the rights of men" that so marks its history.

The lower court posited Stanley v. Schwalby, 147 U.S. 508, 13 S.Ct. 416 (1893) as controlling. However, Stanley merely addressed the issue of whether a political subdivision may cure title defects through acquisitive prescription. In contrast, the instant case involves an unprecedented application of the doctrine of acquisitive prescription to a taking by a political body without just title and in legal bad faith. The constitutional significance of the distinction between possession in good faith by a public body and that body's possession as a mere squatter has not been previously addressed by this Court.

2. WRITS SHOULD BE GRANTED TO SECURE EQUAL PROTECTION TO CITIZENS WHO CANNOT SECURE TITLE FROM THE STATE BY REASON OF POSSESSION.

That the Supreme Court of Louisiana should sanction a taking by a Levee Board or District based upon bad faith acquisitive prescription passes into outrage when one considers the provisions of Title 38, Section 295 of the Revised Statutes of Louisiana. The Statute reads as follows:

> Sec. 295. Acquisitive Prescription Shall Not Run Against Levee Districts.
>
> The prescription by which the ownership of property is acquired as defined by Article 3458 of the Louisiana Civil Code shall not run against any levee district of the State or against the Board of Commissioners of any levee district.

Thus, the Levee Board may take from citizens, but citizens may not take from the Levee Board--an anomaly indeed. The Louisiana Courts attempt to justify this anomaly by suggesting that it is based upon the public "good" and the public "interest." This may or may not be true in the case of a <u>good faith</u> possessory title. It is most certainly false when the taking is in bad faith, a seizure which does

only violence to the public good and the public interest.

The violation of equal protection as between a private citizen and a public Levee Board is equally patent. Certainly, no reasonable basis for the distinction has been or could be offered. Again, writs should issue.

3. WRITS SHOULD ISSUE TO PREVENT AN INFRINGEMENT UPON THE PUBLIC DOMAIN OF THE UNITED STATES BY THE UNLAWFUL AND BAD FAITH ACTIONS OF THE STATE OF LOUISIANA.

The Levee Board began its bad faith possession of the land at bar in 1924. At that time and until the Burat patent was issued in 1972, the owner of record of that property was the United States, which had paid in cash for Sections 29 and 32

and had recorded its deed in the official depository of Plaquemines Parish.

The 30-year bad faith possession has now been held to have taken title out of the United States before 1972 so as to nullify the patent transmission of title to Hubert's heirs in 1972--all of this by the operation of a state statute.

This is plainly offensive to Article 4, Section 3 of the Constitution of the United States which provides, in part, as follows:

> The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.
>
> U.S. Const. Art 4, §3, cl. 2.

This Court has long enforced the plenary scope of this grant. Redfield v. Parks, 33 L.Ed. 327, 132 U.S. 239, 10 S.Ct. 83 (1889) is both early and typical. There, the Court held as follows:

> Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Federal government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title; **until its issuance, the fee is in the government, which, by the patent, passes to the grantee, and he is entitled to recover the possession in ejectment.** 33 L.Ed. at 330, 132 U.S. at 245, 246; 10 S.Ct. at 85; (quoting Bagnell v. Broderick, 13 Pet. 436, 10 L.Ed. 235, 38 U.S. 374 (1839)). Emphasis supplied.

The cases which recognize the principle set forth in Redfield are legion. In Gibson v. Chouteau, 13 Wall. 92, 99, 20 L.Ed. 534, 536, 80 U.S. 92, 99 (1871), for example, the United States Supreme Court emphatically held:

> With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere

with this right or embarrass its exercise. . . . (emphasis supplied).

Against a title emanating from the United States, no claim of adverse possession--acquisitive prescription--can prevail. Prescription cannot run against the sovereign. The fact that this is so and reasons for this rule are succinctly, if arcanely, set forth in Gibson:

> It is matter of common knowledge that statutes of limitation do not run against the State. That no laches can be imputed to the king, and that no time can bar his rights, was the maxim of the common law, and was founded on the principle of public policy, that as he was occupied with the cares of government he ought not to suffer from the negligence of his officers and servants. The principle is applicable to all governments, which must necessarily act through numerous agents, and is essential to a preservation of the interests and property of the public. It is upon this principle that in this country the statutes of a State prescribing periods within which rights must be prosecuted are not held to embrace the State itself, unless it is expressly designated or the mischiefs to be remedied are of such a nature that it must necessarily be included. As legisla-

> tion of a State can only apply to persons and things over which the State has jurisdiction, the United States are also necessarily excluded from the operation of such statutes. (footnote omitted) 13 Wall at 99; 20 L.Ed. at 536; 80 U.S. at 99.

Other cases which hold that one cannot prescribe against land held by the Government are also legion.

The import of these holdings cannot be stated strongly enough. The United States was record owner of Sections 29 and 32 until 1972. Until 1972, any possession by the defendants--or defendants' predecessors or anyone--had absolutely no effect. No possession ripened into title. It could not. Plaintiffs acquired ownership in 1972. Then and only then did the land pass into private ownership such that acquisitive prescription--title by possession--could begin to run. The heirs of Burat initiated this action in 1972--well prior to the time that defendants could assert any claim they acquired by possession from the Burats.

Thus, the vesting of title in the State of Louisiana's Levee Board necessarily includes the wresting of that title from the United States. This Court should correct that usurpation.

4. AN APPEAL SHOULD LIE AND WRITS SHOULD BE GRANTED SO AS TO SECURE THE PLAINTIFFS' PROPERTY RIGHTS ARISING OUT OF AND GUARANTEED BY THE TREATIES, PATENTS AND LAWS OF THE UNITED STATES, ALL OF WHICH WERE PUT ASIDE BY THE COURTS OF LOUISIANA WHICH DECIDED THE CASE SOLELY ON THE BASIS OF THE DOMESTIC LAW OF BAD FAITH POSSESSION.

On its merits the decision below is wrong. It requires a holding that title passed to the Burats in 1842, at the time of the quit-claim confirmatory act. Because of the sale and patents to

Hodge, all of which predate that statute, that cannot be. Even the courts of Louisiana recognize this, at least in cases in which the state is not party. To this end, one need only read Perkins, et al. v. Vincent, et al., 47 La.Ann. 579 (La. 1895). There, in a case identical to that now at bar (save for the absence of the state as a party) the Supreme Court of Louisiana ruled as follows:

> Lands subject to equitable claims within the territory acquired by the United States from Spain under the treaty of 1819, requiring survey and confirmation by the United States, are, until the approved survey, confirmation or patent issued, part of the public domain. (citations omitted)
>
> Hence until surveyed and confirmed to the claimant by act of Congress referring to the survey or patent issued, no prescription runs against him.
>
> * * *
>
> The plaintiffs sue as the heirs of James Goings. The lands claimed lie within the once disputed territory between the western boundary of the State and the Rio Hondo, the claims to

> lands within which territory were protected by our treaty with Spain in 1819. Going's claim, based on habitation only, never surveyed, was merely equitable. The Boards of Land Commissioners of the United States recommended the claim for confirmation, stating the land to be three hundred and twenty acres on the west side of "the Quelque shue," east bank of Bayou "Shou Pique," opposite the claim of James Ashworth. The confirmation was by act of Congress in 1828. While thus confirmed, the land, though subject to the equitable claim, must be deemed to have formed part of the public domain until at least it was ascertained by a public survey, and the issue of a patent or its equivalent confirmation of the claimant's title by act of Congress referring to the survey. Until such survey the land was imprescriptible, and hence no prescription in respect to such land could run against the claimant or his heirs. It is claimed the field notes of the survey were furnished in 1874, but the survey itself, by the authority of the United States, was not approved by the Surveyor General, nor was any patent issued to Goings' heirs till 1890. It is in our opinion clear that the pleas of prescription must fail. (citations omitted)

Note that the decision in Perkins was based upon federal statutes: Revised Statutes, United States, Secs. 2223, 2247. Indeed, all of the rights denied

the plaintiffs by the State of Louisiana are rooted firmly in the Constitution and body of laws of the United States.

Those rights begin, after all, with the Louisiana Purchase Treaty which obligated the United States to respect and to provide machinery for the implementation of whatever inchoate right to claim title Hubert Burat may have had prior to 1803. See: Oneida Indian Nation of New York State v. Oneida County, New York, 39 L.Ed2d 73, 414 U.S. 661, U.S. 94 S.Ct. 772 (1974). Moreover, the vested rights to title now at bar flow from a patent of the United States issued in 1972, a patent said, because of Louisiana Statutes, not to be translative of title, notwithstanding the fact that the United States, by the actions of its land officers, was the owner of record.

The validity of the 1972 patent, in turn, rests on these and many United States statutes, upon which the just result of this case depends:

ACT OF CONGRESS, MARCH 26, 1804 (2 Stat. 283)

The 8th Congress sat in 1804 and included in its business many of the problems attendant upon the Louisiana Purchase. Notably, it set aside any landholdings in the territory of the purchase of or by right of the Spanish government. It then made a proviso (Act of March 26, 1804; Sec. 14) specifically excepting the rights of actual settlers pursuant to the treaty rights previously cited:

> Provided nevertheless, that anything in this section contained shall not be construed to make null and void any bona fide grant, made agreeably to the laws, usage and customs of the Spanish government to an actual settler on the lands so granted, for himself and for his wife and family; or to make null and void any bona fide act or proceeding done by an actual settlor agreeable to the laws, usage and customs of the Spanish government, to obtain a grant for lands actually settled on by the person or persons claiming title thereto, if

> such settlement in either case was actually made prior to the twentieth day of December, one thousand eight hundred and three. (App. 37)

The beginning of the adjudication of this land case lies in the determination of the rights Burat did or did not secure pursuant to this statute. His right to make a claim to the land relates specifically to actual settlement on his estate during Spanish rule prior to 1795 and his marriage in 1803. Whatever those rights were, they were recognized and ratified by these provisions.

ACT OF CONGRESS, MARCH 2, 1805 (2 Stat. 324)

The recognition of a right is one thing; the implementation another. In 1805 the 8th Congress provided machinery through which Burat might perfect his claim. The statute provides preliminarily in Section 2:

> . . . every person or to the legal representative or representatives of every person, who being either the head of a family of 21 years of age, had prior to the 20th day of December, one thousand eight hundred and three, with the permission of the proper Spanish officer, and in conformity with the laws, usages, and customs of the Spanish government made an actual settlement on a tract of land within the said territory, not claimed by virtue of the preceeding section or of any Spanish or French grant had the actual possession of the said territories, and who did on the said 20th day of December, 1803 actually inhabit and cultivate the said tract of land; the tract of land thus inhabited and cultivated, shall be granted. (App. 39)

In order to realize the grant, Section 4 made it necessary that:

> . . . Every person claiming lands . . . shall before the first day of March, one thousand eight hundred and six, deliver to the register of the landoffice, or recorder of land titles, within whose district the land may be, a notice of writing, stating the nature and extent of his claims, together with a plat of the tract or

> tracts claimed; and shall also, on or before that day, deliver to the said register or recorder, for the purposes of being recorded, every grant, order of survey, deed, conveyance, or other written evidence of his claim; and the same shall be recorded by the register or recorder, or by the translator hereinafter mentioned, in books to be kept by them for that purpose, on receiving from the parties at the rate of twelve and one half cents for every hundred words contained in such written evidence of their claims. (App. 39)

A further provision in Section 4 placed a time limit upon the making of claims:

> . . . And if such person shall neglect to deliver such notice of writing of his claim, together with a plat as aforesaid, or cause to be recorded such written evidence of same, all his right, so far as the same is derived from the two first sections of this act, shall become void, and for ever thereafter be barred; nor shall any incomplete grant, warrant, order of survey, deed or conveyance, or other written evidence which shall not be recorded as above directed, ever after be considered or admitted as evidence in any court of the United States. (App. 39)

It is significant to note that the statute clearly contemplates that cases or controversies arising out of these land claims should be treated as federal questions, for the statute specifically reads 'in any Court of the United States.'

In Section 5 of the act, commissioners or registrars and recorders were commissioned to handle the claims, and, it is significant to note, given quasi-judicial authority:

> Each board or a majority of each board, shall, in their respective districts, have power to hear and decide in a summary manner, all matters respecting such claims, also to administer oaths, to compel the attendance of, and examine witnesses, and such other testimony as may be adduced, to demand and obtain from the proper officer and officers, all public records, in which grants of land, warrants, or orders of survey, or any other evidence of claims to land derived from either the French of Spanish governments may have been recorded; to take transcripts of such records of a public nature relative to the granting sale, transfer, or titles of lands

> within their respective districts; and to decide in a summary way, according to justice and equity on all claims filed with the register or recorder, in conformity with the provisions of this act. (App. 39)

In sum, this act confirmed and spelled out Burat's right to make a claim to title and established machinery which he ultimately put into play in order to perfect that right. The second part of the adjudication of this case requires the determination of what rights were guaranteed him by said statute, whether he met the requirements which were provided.

There is another part of the adjudication which turns upon this statute. By virtue of the many extensions in the statutory period provided for the filing of claims, Burat filed affidavits and notices in 1820 and in 1837. In 1837 the register and recorder accepted the Burat claim and favorably reported it to Congress. Note that in 1837 a valid competing title had already been secured by the

predecessors of Hodge. Note also that the register and recorder were given quasi-judicial authority. The meaning of the acceptance of the Burat claim as a quasi-adjudication by a federal officer acting pursuant to this statute is a purely federal question and bears most vitally upon the issues at bar.

ACT OF CONGRESS, FEBRUARY 28, 1806 (2 Stat. 352) AND ACT OF CONGRESS, APRIL 21, 1806 (2 Stat. 391)

Section 3 of the February 28, 1806 act repealed the provision of the 1805 act "so far as relates to claimants whose tracts had not been surveyed by the proper officer, under the Spanish government prior to the twentieth day of December, one thousand eight hundred and three." (App. 42)

Similarly, the 1805 act had made it necessary for the claimant to land to show that he had settled with the consent of the appropriate Spanish officer. The April 21, 1806 act waived this requirement:

> Every person or persons claiming a tract of land by virtue of the second of the act, to which this act is a supplement, and who had commenced an actual settlement on such tract, prior to the first day of October, one thousand eight hundred and had continued actually to inhabit and cultivate the same, during the term of three years from the time when such actual settlement had commenced, and prior to the twentieth day of December eighteen hundred shall be considered as having made such settlement with the permission of the proper Spanish officer, although it may not be in the power of such person or persons to produce sufficient evidence of such permission. (App. 43)

ACT OF CONGRESS, APRIL 25, 1812 (2 Stat. 713)

This 1812 act restructured the Board of Commissioners and refined their responsibilities and obligations. It confirmed however, their federal judicial authority, specifically providing that:

> The said commissioners shall have power in their respective districts

> to inquire into the justice and validity of the claims filed with them as aforesaid; it shall be their duty to ascertain in every case whether the lands claimed have been inhabited and cultivated; at what time such inhabitation and cultivation commenced; when surveyed and by whom and what authority; and into every other matter respecting the claims which may affect the justice and validity thereof; and for that purpose shall have power to administer oaths and to compel the attendance of, and examine witnesses and such other testimony as may be adduced; to have access to all records of a public nature.
> (App. 44)

Once again, the meaning of the acceptance of the Burat claim, in the face of an existing title, must be adjudicated in this case and is a purely federal question.

ACT OF CONGRESS MAY 11, 1820 (3 Stat. 573)

AND ACT OF CONGRESS NO. 817 FEBRUARY 6, 1835 (4 Stat. 749)

This May 11, 1820 (App. 45) act of extended the time for filing claims through December 31, 1820. Whether or not Burat secured rights by filing under this extension and the play of these rights against the outlaw titles is a federal question and must be resolved in the decision of this case. The same is precisely true of the Act of February 6, 1835 (App. 49) pursuant to which his claim was finally reported.

ACT OF CONGRESS NO. 17, JANUARY 12, 1825 (4 Stat. 80)

This statute is critical and is reproduced in full.

> An act authorizing repayment for land erroneously sold by the United States.

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every person, of the legal representative of every person, who is or may be, a purchase of a tract of land from the United States, the purchase whereof is, or may be void, by reason of a prior sale thereof by the United States, or by the confirmation, or other legal establishment of a prior British, French or Spanish grant thereof, of for want of title thereto in the United States from any other cause whatsoever, shall be entitled to repayment of any sum or sums of money paid for, or on account of such tract of land on making proof, to the satisfaction of the Secretary of the Treasury, that the same was erroneously sold, in manner aforesaid by the United States, who is hereby authorized and required to repay such sum or sums of money, paid as aforesaid. (App. 48)

Pursuant to this act, the United States bought back two of the four sections deeded to Hodge. The meaning of the act and the meaning and effect of buy-back is a federal question and one upon which a critical part of this case will resolve itself.

ACT OF CONGRESS, NO. 852, JULY 6, 1842 (5 Stat. 491)

Following a favorable reporting by the register and recorder, Congress confirmed the Burat claim (No. 60 on the report). Section One of this statute recites that ". . . the claims . . . being numbers . . . sixty . . . be and the same are hereby confirmed." Section 4 of the statute then makes an important caveat:

> Provided, That this act shall amount only to a relinquishment on the part of the United States, and shall in no manner affect the rights of third persons, and, on the presentation to the Commissioner of the General Land Office of a plat of survey duly approved by the surveyor-general of the State of Louisiana, the claimant shall be entitled to a patent. (App. 51)

This statute is, of course, critical to the case. The deeding was, in the language used, a quit-claim of the interests of the United States. What that means and what that interest was, in view of the valid

earlier titles, are purely federal questions which must be resolved by this Court.

ACT OF CONGRESS, JUNE 2, 1858
(11 Stat. 249)

Burat had an inchoate right in his estate, less than title, and even less than equitable title. The nature of that right may be described by analogy by Section 3 of the act of June 2, 1858 which provides in part:

> . . . in all cases of confirmation by this act or where any private land claim has been confirmed by Congess, and the same in whole or in part, has not been located or satisfied either for want of a specific location prior to such confirmation, or for any reason whatsoever other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor-general of the district in which such claim was situated, upon satisfactory proof that such claim has been so confirmed and that the same, in whole or in part, remains unsatisfied to

> issue to the claimant, or his legal representatives, a certificate of location for a quantity of land equal to that so confirmed and unsatisfied. (Emphasis added) (App. 52)

Exactly what a confirmed but unsatisfied claim may be is by no means crystal clear. It is clear that in 1888, the surveyor general's opinion, when acting in a quasi-judicial federal capacity, was that the shoe fit. What the nature of the beast is and what its relation to the Burat heirs title might be are entirely federal questions.

There are also several federal questions essential to the case that a simple listing of the relevant statutes will not make plain. Certainly foremost is the precise meaning of the 1972 transmission of patent. The question might be stated this way: What rights did the United States have (pursuant to its sole control of the public domain), to transmit to the Burat heirs of 1972, in face of a state bad faith possession, and in view of the Hodge

titles and the United States buy-back. It is the epicenter of the plaintiff's case and it is entirely federal.

Other Federal questions are both plain and important:

1. What land rights flow from the United States to a settler by the act of official survey of the surveyor general pursuant to a confirmed but unsatisfied land claim?

2. What is the effect of congressional confirmation of a land claim, title to which has since passed, on record, from the United States to a private land owner by a sale valid in form under the then existing laws?

3. Is a state court empowered to declare void patents issued by the United States?

4. May a state take, by bad faith possession, title to property, the record owner of which is the United States?

These threads, spun from the fabric of federal law, mesh in ways which seem clear to the petitioners. Based upon his settlement and possession, Burat took up rights which were not satisfied until 1972 when patents were issued to his heirs.

This was implicit in the ruling on his case made by a United States Land Officer in 1888. That officer was Calhoun Fluker, U.S. Surveyor General for the District of Louisiana. Fluker ruled that in view of the valid sale and valid patents issued in favor of Hodge, the Burat claim was confirmed but unsatisfied.

It should have been satisfied by the 1972 patent, but the courts and laws of Louisiana have erroneously frustrated the change of title required by the Constitution and laws of the United States.

The Burat heirs stand upon these statutes. The outcome of the case depends on their construction. Writs should issue to finally honor the commitments of the United States--to Burat and his heirs.

CONCLUSION

1. Writs should issue.

2. An appeal should lie.

Respectfully submitted:

JOHN H. BROOKS
847 3rd Street
Gretna, Louisiana 70053
(504)362-6272

PETER C. LADART
1112 Fifth Street
Gretna, Louisiana 70053
(504)361-5741

BARHAM & CHURCHILL
MACK E. BARHAM
A Professional Law Corporation
400 Lafayette Street, Suite 300
New Orleans, Louisiana 70130
(504)523-3565

ATTORNEYS FOR PLAINTIFFS-PETITIONERS

Supreme Court, U.S.
FILED
DEC 31 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-1137

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

CECILIA ELSTON, ET AL.
Petitioners

versus

BOARD OF LEVEE COMMISSIONERS
OF THE ORLEANS LEVEE DISTRICT
OF THE STATE OF LOUISIANA, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEAL STATE OF LOUISIANA

VOLUME II

JOHN H. BROOKS
847 3rd Street
Gretna, Louisiana 70053
(504)362-6272

PETER C. LADART
1112 Fifth Street
Gretna, Louisiana 70053
(504)361-5741

BARHAM & CHURCHILL
MACK E. BARHAM
COUNSEL OF RECORD
A Professional Law Corporation
400 Lafayette Street, Suite 300
New Orleans, Louisiana 70130
(504)523-3565

ATTORNEYS FOR PLAINTIFFS-
PETITIONERS

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SUCCESSION OF BURAT (BURAS) NO. CA 1518

VS FOURTH CIRCUIT

THE BOARD OF LEVEE COMMISSIONERS, ET AL COURT OF APPEAL

STATE OF LOUISIANA

APPEAL FROM THE TWENTY-FIFTH JUDICIAL DISTRICT COURT, PLAQUEMINES PARISH, LOUISIANA, HONORABLE JULIAN E. BAILES, PRESIDING JUDGE PRO TEMPORE

PHILIP C. CIACCIO,
JUDGE

(Court composed of Judges William V. Redmann, Robert J. Klees and Philip C. Ciaccio)

Redmann, J. concurs.

JOHN H. BROOKS
847 Third Street
Gretna, Louisiana 70053

PETER C. LADART
1112 Fyth Street
Gretna, Louisiana 70053
Attorneys for Appellants

RICHARD J. MCGINITY
225 Baronne Street
New Orleans, Louisiana 70112

WILSON S. SHIRLEY, JR.
M. HAMPTON CARVER
FRANK A. TESSIER

Milling, Benson, Woodward,
Hillyer, Pierson & Miller
1100 Whitney Building
New Orleans, Louisiana 70130

JOHN E. BAILEY
DAVID R. STEVENSON
P. O .Box 3725
Houston, Texas 77253

J. WAYNE ANDERSON
1424 Whitney Building
New Orleans, Louisiana 70130

STEPHEN G. LINDSAY
P. O. Box 60193
New Orleans, Louisiana 70160

DAVID A. KERSTEIN
902 Whitney Building
New Orleans, Louisiana 70130

DONALD PUCKETT
P. O. Box 15570
Baton Rouge, Louisiana 70895
Attorneys for Appellees

AFFIRMED

April 26, 1985

Succession of Burat (Buras) CA 1518

Plaintiffs, heirs of Hubert Burat, filed this appeal from an adverse judgment of the district court which sustained the defendant's exception of thirty (30) years acquisitive prescription. Defendants answer the appeal and request that this Court amend the lower court judgment to recognize its rights under their exception of ten (10) years acquisitive prescription and their exception of peremption based upon tax sales. We affirm the judgment of the district court.

The Succession of Hubert Burat (Buras) brought this petitory action to recover sections 29 through 32 of Township 19 south, range 16 east, which land is located opposite Buras, Louisiana, on the left descending bank of the Mississippi River in Plaquemines Parish. Additionally, the suit seeks an accounting and damages for wrongful possession. In response to the suit, defendants, the Board of Levee Commissioners of the Orleans Levee District,

Chevron U.S.A. Inc., Chevron Pipe Line Company, Gulf Refining Company, Louisiana Power and Light Company, Shell Oil Company, Estate of William G. Helis and Helis Enterprises, Inc., filed exceptions of peremption and ten and thirty years acquisitive prescription.

The facts of this case are as follows:

During the reign of the Spanish Soverign [sic] and prior to the Louisiana Purchase, Hubert Burat settled the tract of land in question, which was located some sixty miles below New Orleans on the east bank of the Mississippi River. In 1803, the Louisiana Purchase incorporated this land into the United States, pursuant to its purchase of Louisiana from the Republic of France.

In 1836, an erroneous federally commissioned survey showed Burat's four sections of land to be other than where they were actually located and it also showed the sections actually

settled and occupied by him to be vacant. The error resulted in two lines of title, as other persons filed claim against this land which the survey showed as vacant.

Burat filed a private claim to Sections 29 through 32 of Township 19 south, Range 16 east, which claim was assigned Number 60. In 1837 a federal land register and recorder included Burat's corrected claim in his report to Congress. In 1842 Congress confirmed Burat's ownership of the land by a special legislative act (July 6, 1842, 5 Stat. 491). On October 24, 1885 the Burat claim was surveyed and the plat authenticated. On October 30, 1885 the Registrar and Receiver issued a patent certificate (No. 166) to the Burat tract. In 1972 the United States issued a patent for the land to Hubert Burat, his heirs and assigns. (Patent No. 1242435 of May 24, 1972, recorded COB 380, folio 351).

In the interim, squatters and persons purporting to have ownership from an erroneous claim of title took turns in occupying the land. In 1838 and 1839 patents were issued to these claimants. Their interest was assigned to Andrew Hodge, Jr. Hodge sold section 30 of the land to Joseph and Matilda Cavalier, by deed dated August 12, 1841 which was recorded September 6, 1948. He sold section 31 to William and Mary Jansen, by deed dated August 12, 1841 and the deed was recorded December 10, 1942. Following his death, Hodge's legal representatives, in 1861, reconveyed, Section 29 and 32 back to the United States. In turn they received a refund of the monies Hodge had paid for the property. Hodge quitclaim to the United States any rights or title he held in Sections 30 and 31 of the tract.

In 1924 through 1926, the Levee Board of the Orleans Levee District acquired the title to this

land when it expropriated the property for the Bohemia Spillway. The remaining defendants were granted leasehold interests from the Levee Board.

The issues presented are: (1) What was the nature of Burat's claim and when did his title to this land come into existence? (2) Can the Levee Board acquire title by prescription and if so, is such acquisition unconstitutional? (3) Did the trial court err in finding that the Levee Board acquired ownership of this land by thirty years acquisitive prescription.

Federal Question:

Burat Title

The plaintiffs contend that the Burat heirs did not acquire title to the subject tract of land until the United States issued a patent to them in 1972 and it is from this date that prescription began to run. They contend that the trial court erred in finding that the Burat heirs received title in

1842 when their claim was confirmed by the Land Department of the federal government. According to the plaintiffs, title could not have passed in 1842 because the United States did not have title at that time. Thus, the plaintiffs reason that the federal government acquired title when it bought back the title from Hodge to sections 29 and 32 of this tract of land in 1861. Further, with regard to sections 30 and 31 plaintiff contends there existed a confirmed claim but it was not satisfied until 1972 when the patent was issued. It was then, plaintiffs contend, that title passed to them and prescription began to run.

Law

The nature of a settler's claim determines when title to land passes to the claimant. Title to land which rested upon claims which had been perfected and complete, according to the laws of the soverign, prior to acquisition of the territory

by the United States did not vest title in the United States, and did not constitute conveyances by the United States. See: Nixon v. Houillon, 20 La. Ann. 515 (1868).

Title to land which relied upon claims which were not perfected and which were incomplete on the date of the Louisiana purchase vested equitable rights with the claimant, such that title vested, at the confirmation of the claim. (Title by possession) Breaux v. Lefort, 209 La. 506, 24 So.2d 879 (1946). (Land grants) Joplin v. Chachere, 107 La. 522, 32 So. 243 (1902); See: Laurence v. Longdeau, 88 U.S. 521, 21 Wall 521 (U.S., 1975).

Hubert Burat filed his private land claim in 1837 founded upon his occupancy and possession prior to 1803. This claim No. 60 was reported favorably to Congress for confirmation on November 22, 1837. The claim was confirmed in 1842. Act, July 6, 1842 (5 Stat. 491).

The trial court correctly concluded that title passed from the United States to Hubert Burat, on Sections 29, 30, 31 and 32 of this tract of land, in 1842 when this private claim was confirmed and not 1972 as claimed by plaintiffs. That is, Burat's claim arose from possession and occupancy of the land while under the reign of the foreign soverign. The claim was incomplete when the land was ceded to the United States. This claimant possessed an equitable right which, upon confirmation, vested title in Burat. Thus we also agree with the conclusion reached by the trial court that the subsequent patent which was issued to Burat in 1972 was "only documentary evidence of that title." Moreover, since a vested right to a patent of public lands is treated as a patent in fact issued, the patent, when issued, relates back to the filing of the entry. See: Steinspring v. Bennett, 16 La. Ann. 201 (1861). See: State of Wyoming v. United States, 255 U.S. 489, 41 S.Ct. 393 (U.S., 1921).

Hodge Patent

The United States held only naked legal title to this land at the time that it issued the Andrew Hodge patent. The full equitable title rested with Hubert Burat, who had performed all of the requirements necessary for the patent to be issued to him. Thus, the United States did not possess the authority to pass title to Hodge in 1838 and 1839. See: Barton's Executor v. Hempkin, 19 La. 510 (La., 1841). The patent which Andrew Hodge obtained through error was therefore void. See: Lott v. Prudhomme, 3 Rob. 293 (La., 1842) McGill v. McGill, 4 La. Ann. 262 (La. 1849), Proctor v. Painter, 15 2d 974 (U.S., 1926).

Plaintiff argues that Hodge was a good faith purchaser and his rights being plenary, they were immune from attack.

The general rule is that a patent to land which has been previously sold granted or reserved

is void. Gould and Tuker, Title XXXII-The Public Lands-Chapter IV pp. 527-528. However, an exception exists when the title to the land has passed to a bona fide purchaser without notice. Gould and Tuker, supra.

We reject the plaintiff's contention that Hodge was a bona fide purchaser whose rights in title were immune from challenge. A bona fide purchaser is one who purchases property for value, without any notice of defect.

With regard to Sections 29 and 32 of the tract of land, the Hodge heirs acknowledged the defect in their title when they applied to Secretary of the Treasury for a refund. The request for refund contained the following language:

> Whereas, the Act Of Congress passed on the 12th day of January 1825 entitled an act authorizing repayment of land erroneously sold by the United States provides that whenever the sale of a tract of land by the United States is void for want of title thereto in the United

> States or from any other cause whatever, the money paid on the same will be refunded by the Secretary of the Treasury. And, whereas, the lots or sections herein below described . . . are covered . . . Sections 29 and 32 of Township 19S of Range 16E by the private claim of Hubert Burat, Certificate No. 60 . . . [the instrument also describes other tracts of land and with respect to each such tract sets out the title which was deemed to be superior to the title to such land purchased by Hodge]. Now Know Ye that for and in consideration of the sum of . . ., I, H.F. Deblieux, . . . hereby sign, transfer, relinquish and surrender to the United States all our rights, title, interest and claim of, in and to the land hereinabove described. (emphasis added).

Moreover, assuming arguendo that Hodge was initially a purchaser in good faith, only he, his heirs or transferees in title, if any, could claim the benefit of that status. Hodge's heirs abandoned any such claim by executing the quitclaim to the Government on Sections 29 and 32 of the tract. As between Hodge's heirs and the United States government, the initial transaction was void ab initio and

of no legal effect whatsoever, thus returning the parties to their original status.

This quitclaim did not create a new legal title in the United States, but only served to remove any cloud that may have been placed on the equitable title held by Hubert Burat. Absent a new legal title in the United States, no interruption of prescription took place. That is, since the title was in Burat since 1842, prescription began to run from that date and contrary to the plaintiff's contention, prescription was not interrupted because of retention of any real rights in the United States Government.

Furthermore, the Hubert Burat heirs are not transferees in title of Hodge (on Sections 29 and 32) nor are they transferees of Champagne and Jansen (on Sections 30 and 31). They therefore have no standing to assert their claim on behalf of Hodge or his estate nor on behalf of any transferees or heirs of Champagne and Jansen.

Prescription

Constitutional Issue

Plaintiffs contend that the statute which enabled the Levee Board to acquire this tract of land did not provide that it could deprive citizens of their title without compensation. Thus, they reason that since the Burats did not receive compensation for the land that the Levee Board's actions constitute a deprivation of property without due process of law. U.S. Const., 14 Amend. We disagree.

The Levee Board did purchase or expropriate these lands before taking possession of them. The Burats were not the recipients of the compensation, because as correctly pointed out by the trial court:

> "[T]he title of the Burats to all the tracts involved in this suit had been divested long before the Levee Board took possession of the property."

Accordingly, there was no deprivation of property without due process of law.

The plaintiffs next argue that, since the Levee Board may prescribe against citizens but citizens are not allowed to prescribe against the Levee Board, this policy violates the equal protection clause of the constitution. U.S. Const., 14 Amend.; La. Const. Art. 1 Sec. 3. R.S. 38:295.

The United States Supreme Court and this state's appellate courts have sanctioned such a policy as being "founded upon the public good and [for] the protection and preservation of the public interest." Stanley v. Schwalby, 147 U.S. 500 at 504, 13 S.Ct. 416 at 421 (1893). Lincoln Parish School Board v. Ruston College, 162 So.2d 419 (La. App. 2nd Cir. 1964).

Distinctions between classes of individuals or persons are permissible if they are reasonable, and not arbitrary, but rest upon some

ground of difference which has a rational relationship to the object of the classification. See: Detraz v. Fontana, 416 So.2d 1291 (La., 1982).

Since there exists a rational basis for distinguishing between the Levee Board and private individuals, with regard to acquisitive prescription, such a policy does not constitute a constitutional denial of equal protection.

Acquisitive Prescription

The trial court found that the defendants had clearly and adequately demonstrated proof of thirty years acquisitive prescription. The court reasoned as follows:

> "This court adopts as its conclusion the following expressions in defendants' brief. These conclusions are fully supported by the records which this court heard from the stand and perused from the record.
>
> The Levee Board established sufficient possession by itself and its lessees for a thirty year prescriptive title within boundaries and a ten and thirty year

> prescriptive title under the deeds by which it and its predecessors hold. Possession of the Levee Board's predecessors in title was sufficiently proved. * * *.
>
> * * *
>
> ' * * * [C]onsidering the nature of the terrain, the trapping, cattle grazing, and myriad other acts of possession of this property show actual corporeal possession over all of it. For this type of land, possession could hardly be shown more conclusively.
>
> ' * * * The land involved consists of several contiguous tracts. As to a part of each of these individual tracts, defendants have shown possession by the predecessors in title of the Levee Board. Additionally, as to each tract of land involved in this suit, defendants have shown possession by the Levee Board of its lessees for at least thirty years prior to commencement of plaintiff suit.
>
> * * * The possession of a part constitutes constructive possession of the whole of each respective tract, which tracts in the aggregate constitute all of the land involved in this suit."

The plaintiffs contend that defendants have failed to prove thirty year acquisitive prescription based upon possession under title. We disagree.

The ownership of an immovable is prescribed for by thirty years, without need for title or possession of good faith. C.C. Art. 3499 (1870). However, all the rules governing prescription under good faith possession are applicable to prescription under bad faith possession except those which are contrary or incompatible. C.C. Art. 3505 (1870). In the case of thirty year prescription founded upon just title, the possessor's good faith is not a consideration. C.C. Art. 3475 (1870) (now, C.C. Art. 3486). Rather, the possessor must only show just title and thirty years possession. In the case of thirty years possession plus title, corporeal possession of a part of the immovable shall be deemed to be constructive possession of the whole within the limits of the title. C.C. Art. 3498 (1870). See also: C.C. Art. 3426 (1982), comment (d), and Hill v. Richey, 221 La. 402, 59 So.2d 434 (1952). Moreover, in such possession cases, the

predecessor's possession may be tacked in order to fulfill the thirty years possession of the current owner. C.C. Arts. 3493-3495 (1870) (now C.C. Arts. 3441 and 3442). See: Bartlett v. Calhoun, 412 So.2d 597 (La., 1982).

The plaintiffs allege that defendants cannot rely upon constructive possession of the land in order to establish ownership by thirty years possession. They reason that the Levee Board acquired the land by several different deeds, each of which described a different tract. Thus, plaintiffs cite Screen v. Trainer for authority. 172 La. 51, 133 So. 359 (La. 1931).

The Screen decision supra does not apply to the facts of this case. That decision involved a large tract of land which was acquired piecemeal by different deeds, thus, the actual possession was only deemed to extend to the limits of the deed covering the tract possessed. Accordingly the facts of that

case are distinguishable from this case. In this case the trial judge found that the defendants proved possession of each tract of the land by the Levee Board and by its predecesors and that finding was clearly supported by the record.

Plaintiffs contend that defendants, being bad faith possessors, cannot benefit from their predecessor's good faith possession. The plaintiffs rely upon Bartlett v. Calhoun for this position. 412 So.2d 597 (La. 1982). The Bartlett decision, supra, does not prevent such tacking of possession in order to complete a thirty year prescriptive period. Thus Bartlett, supra, is inapposite.

Plaintiffs allege that the defendant, Levee Board, failed to prove "just title". They contend that the inaccuracies of the Brodtman Plat, which was utilized to establish title, makes the title fatally defective. A review of the record indicates that various deeds, maps and abstracts of the land

were utilized, in conjunction with expert testimony, to establish the Levee Board's just title. An expert for the defendant testified that the title was clearly established, even without the inclusion of the defective Brodtman plat. The trial court apparently found that just title had been proved and this finding will not be disturbed, as it is supported by the record.

In conclusion, plaintiffs allege that possession cannot be inferred from title. We agree. In this case, however, for the reasons stated, we find that defendant proved possession, as well as title.

Since we conclude that the trial court correctly found that the defendants had proven thirty years prescriptive title, we do not address the issues of thirty year prescription within boundaries or whether they held a ten year prescriptive title or established peremptive rights as a result of tax sales.

For the reasons assigned the judgment of the district court is affirmed at appellant's cost.

AFFIRMED

TWENTY-FIFTH JUDICIAL DISTRICT COURT

PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NO. 14-706

SUCCESSION OF HUBERT BURAT (BURAS)

VS.

BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT, ET AL

REASONS FOR JUDGMENT

This is a petitory action brought by the Succession of Hubert Burat against the Board of Levee Commissioners of the Orleans Levee District, Chevron U.S.A. Inc., Chevron Pipe Line Company, Gulf Refining Company, Louisiana Power and Light Company, Shell Oil Company, Estate of William G. Helis and [illegible]s Enterprises, Inc., all of whom claim

an interest in the subject property adverse to that asserted by plaintiffs. As Hubert Burat, the original claimant and ancestor from whom this title devolved, died in 1847, his descendants at this time are too numerous to name (now number some 1200 persons) and the plaintiffs as such are representatives of the class.

The plaintiffs, and their ascendants, have been out of possession of the subject area for over one hundred years. Specifically the lands involved in this litigation are Sections 29, 30, 31 and 32, Township 19 South, Range 15 East, all located and fronting on the left descending bank of the Mississippi River opposite Buras, Plaquemines Parish, Louisiana. All of the subject lands are now a part of the Bohemia Spillway which was authorized by Act 99 of 1924 as a flood control facility by the legislature of the state of Louisiana, and was to be acquired and built by the Orleans Levee District.

All defendants herein, except the Orleans Levee District derived their occupancy and possession through the levee board.

To this action of the plaintiffs, the defendants filed exceptions of ten and thirty years acquisitive prescription and of peremption resulting from numerous tax sales which transpired earlier.

The plaintiffs, in the main, defend against these exceptions by seeking to show that title never passed from the United States until the latter issued a patent to Hubert Burat, his heirs and assigns in the year 1972. It is an historical fact that the United States acquired Louisiana from the Republic of France in the year 1803 during the term of office of President Thomas Jefferson.

Hubert Burat filed a private claim to Sections 29, 30, 31 and 32, Township 19 South, Range 16 East (being the same land herein concerned) which was assigned claim No. 60 and

Congress by appropriate act (July 6, 1842, 5 Stat. 491) approved and confirmed the claim.

There is obvious confusion in this chain of title created by the fact that the United States made a disposition of this property to persons other than its rightful claimant who in turn assigned their interest to Andrew Hodge, Jr. It was during the administration of President Van Buren that Andrew Hodge, Jr. received, as assignee of the original purchasers (Section 29, assignors, Pierre Paul Orryac and Josephine Josse; Section 30, assignors Matilde Cavalier and Joseph Cavalier; Section 31, William Jansen and Mary Towns; and Section 32, Adeline Cavalier and Edmond Cavalier) all in spite of the peremptive rights of Hubert Burat to this identical land. There is proof herein that Hubert Burat occupied and possessed this land prior to the 1803 acquisition of Louisiana by the United States. During his lifetime Andrew Hodge, Jr. sold whatever

rights he had in Sections 30 and 31. This is evidenced by deed dated August 12, 1841 and recorded September 6, 1848, conveying to Matilda Cavalier and Joseph Cavalier Section 30 (being the same parties from whom Andew [sic] Hodge, Jr. had acquired this property) and by deed dated August 12, 1841 and recorded December 10, 1842 to Mary Towne and William Jansen Section 31.

Further, it appears that following Hodge's death his legal representative made application for and was granted a refund for the monies Hodge had paid for the property and the land, Sections 29 and 32, was reconveyed to the government, the basis for such being the fact that Burat had a superior claim. It was on that reason that when Cyprien Burat, a son of Hubert Burat, made application for a patent certificate it was approved on October 24, 1885 for the four sections described therein and being the subject four sections.

The same facts and reasons which operated to void the previously issued patents in the name of Andew [sic] Hodge, Jr. to Sections 29 and 32 also voided the previously issued patents to land subsequently by Andrew Hodge, Jr. Outstanding at the time the original void patents were issued to Andrew Hodge, Jr. the Burat claim No. 60 had been already approved by the bureau and thereafter Congress confirmed the patent.

The position of the plaintiffs cannot stand the test. There can be no dispute that the U.S. Congress in 1842 did, in fact, confirm the claim of Burat to the lands in dispute. It was at that time that title passed from the United States to Hubert Burat. See Langdeau v. Hines, 88 U.S. 521, 22 L. Ed. 606 (1875). Therein the U.S. Supreme Court stated:

> " * * * If the claim be to land with defined boundaries, or capable of identification, the legislative confirmation

> perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title. * * *."

Following this rationale, which this court does, the patent No. 1242435, dated May 24, 1972, COB 380, folio 351 (Abstract Vol. II, page 438) is nothing more that [sic] documentary evidence of that title. This patent specifically refers to claim No. 60 of Hubert Burat and recites that this claim "was confirmed by Section 3 of the Act of July 6, 1842 (5 Stat. 491) and that the said claim has been regularly surveyed and described as follows:

St. Helena Meridian, Louisiana
T. 19 S., R. 16 E.,
Sec. 29, All;
Sec. 30, All;
Sec. 31, All;
Sec. 32, All.

* * *."

Further, the patent contains the usual stipulation and condition:

> "This patent shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land."

This court finds, and so holds, that the title to Sections 29, 30, 31 and 32 was legally severed from the United States when by act of Congress, above referred to, in 1842 it confirmed the claim no. 60 of Hubert Burat.

Passing now to the issue of thirty years prescription pleaded by the exception of the defendants, it is found that exceptors have clearly and adequately demonstrated the requisite proof to sustain their position.

This court adopts as its conclusion the following expressions in defendants' brief. These conclusions are fully supported by the records which this court heard from the stand and perused from the record.

"The Levee Board established sufficient possession by itself and its lessees for a thirty year prescriptive title within boundaries and a ten and thirty year prescriptive title under the deeds by which it and its predecessors hold. Possession of the Levee Board's predecessors in title was sufficiently proved. * * *.

"The Burats urge that, because, under a 1964 statute, prescription can not now run against the Levee Board, it cannot run in the Levee Board's favor. The holding in Lincoln Parish School Board v. Ruston College, 162 So.2d 419 (2nd Cir. 1964), cert. denied, 164 So.2d 354, and Stanley v. Schwalby, 147 U.S. 508, 37 L.Ed. 259 (1893) are dispositive of this issue. These decisions respectively hold that the State of Louisiana or its agencies and the United States, or its agents, can acquire title to land by adverse possession notwithstanding that prescription does not run against the state or federal govern-

ments. The Burats point out that the act pursuant to which the Bohemia Spillway was constructed required that the Levee Board purchase or expropriate the lands before taking possession of them. That is precisely which the Levee Board did. The title of the Burats to all the tracts involved in this suit had been divested long before the Levee Board took possession of the property. * * *.

"* * *[C]onsidering the nature of the terrain, the trapping, cattle grazing, and myriad other acts of possession of this property show actual corporeal possession over all of it. For this type of land, possession could hardly be shown more conclusively.

"* * * The land involved consists of several contiguous tracts. As to a part of each of these individual tracts, defendants have shown possession by the predecessors in title of the Levee Board. Additionally, as to each tract of land

involved in this suit, defendants have shown possession by the Levee Board and its lessees for at least thirty years prior to commencement of plaintiffs' suit.

* * * The possession of a part constitutes constructive possession of the whole of each respective tract, which tracts in the aggregate constitute all of the land involved in this suit."

As this court finds the defendant-exceptors have sustained the burden of proof of establishing thirty years prescriptive title, there is no need to consider the ten year prescriptive period or the peremption as applied to the tax sales.

The exception of thirty years prescriptive title is sustained and accordingly, plaintiffs' demands are rejected at their costs.

Natchitoches, La., June 14, 1983.

/s/
JUDGE PRO TEMPORE

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans, May 29, 1985

Dear Sir:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED SUCCESSION OF BURAT (BURAS) v. THE BOARD OF LEVEE COMMISSIONERS, ET AL.

NO. CA-1518

Very truly yours,

MARJORIE R. CAMBRE, Clerk

THE SUPREME COURT OF THE STATE OF LOUISIANA

SUCCESSION OF
HUBERT BURAT (BURAS)

VS. NO. 85-C-1311

BOARD OF LEVEE COMMISSIONERS OF
ORLEANS LEVEE DISTRICT, ET AL

IN RE: Burat, Hubert Succession of; Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, Number CA 1518; Parish of Plaquemines 25th Judicial District Court Div. "B" Number 14-706

October 4, 1985

Denied.

JAD

WFM

FAB

JCW

DENNIS & LEMMON, J.J., would grant the writ.

CALOGERO, J., recused for the reason that prior to becoming a justice of this Court in a case involving these same parties and in closely allied litigation, he represented as an attorney certain of the parties who are included in the class herein.

Supreme Court of Louisiana
October 4, 1985

/s/
Clerk of Court
For the Court

Act of Congress, March 26, 1804
(2 Stat. 283)

An Act erecting Louisiana into two territories, and providing for the temporary government thereof.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all that portion of country ceded by France to the United States, under the name of Louisiana, which lies south of the Mississippi territory, and of an east and west line to commence on the Mississippi river, at the thirty-third degree of north latitude, and to extend west to the western boundary of the said cession, shall constitute a territory of the United States, under the name of the territory of Orleans; the government whereof shall be organized and administered as follows:

* * *

Sec. 14. And be it further enacted, That all grants for lands within the territories ceded by the French Republic to the United States, by the treaty of the thirtieth of April, in the year one thousand eight hundred and three, the title whereof was, at the date of the treaty of St. Ildefonso, in the crown, government or nation of Spain,

and every act and proceeding subsequent thereto, of whatsoever nature, towards the obtaining any grant, title, or claim to such lands, and under whatsoever authority transacted, or pretended, be, and the same are hereby declared to be, and to have been from the beginning, null, void, and of no effect in law or equity. (a) Provided nevertheless, that any thing in this section contained shall not be construed to make null and void any bona fide grant, made agreeably to the laws, usages and customs of the Spanish government to an actual settler on the lands so granted, for himself, and for his wife and family; or to make null and void any bona fide act or proceeding done by an actual settler agreeably to the laws, usages and customs of the Spanish government, to obtain a grant for lands actually settled on by the person or persons claiming title thereto, if such settlement in either case was actually made prior to the twentieth day of December, one thousand eight hundred and three: And provided further, that such grant shall not secure to the grantee or his assigns more than one mile square of land, together with such other and further quantity as heretofore hath been allowed for the wife and family of such actual settler, agreeably to the laws, usages and customs of the Spanish government. And that if any citizen of the United States, or other person, shall make a settlement on any lands belonging to the United States,

within the limits of Louisiana, or shall survey, or attempt to survey, such lands, or to designate boundaries by marking trees, or otherwise, such offender shall, on conviction thereof, in any court of record of the United States, or the territories of the United States, forfeit a sum not exceeding one thousand dollars, and suffer imprisonment not exceeding twelve months; and it shall, moreover, be lawful for the President of the United States to employ such military force as he may judge necessary to remove from lands belonging to the United States any such citizen or other person, who shall attempt a settlement thereon.

Act of Congress No. 701, March 2, 1805
(2 Stat. 324)

No. 701 - An Act for ascertaining and adjusting the titles and claims to land, within the Territory of Orleans, and the District of Louisiana.

* * *

Sec. 2. . . . every person, or to the legal representative or representatives of every person, who being either the head of a family of twenty-one years of age, had prior to the twentieth day of December, one thousand eight hundred and three, with the permission of the proper Spanish officer, and in conformity with the laws, usages, and customs of the Spanish Government, made an actual settlement on a tract of land within the

said territories, not claimed by virtue of the preceeding section, or of any Spanish or French grant made and completed before the first day of October, one thousand eight hundred, and during the time the government which made such grant had the actual possession of the said territories, and who did on the said twentieth day of December, one thousand eight hundred and three, actually inhabit and cultivate the said tract of land; the tract of land thus inhabited and cultivated, shall be granted. . . .

* * *

Sec. 4. . . . every person claiming lands . . . shall, before the first day of March, one thousand eight hundred and six, deliver to the register of the land office, or recorder of land titles, within whose district the land may be, a notice of writing, stating the nature and extent of his claims, together with a plat of the tract or tracts claimed; and shall also, on or before that day, deliver to the said register or recorder, for the purposes of being recorded, every grant, order of survey, deed, conveyance, or other written evidence of his claim; and the same shall be recorded by the register or recorder, or by the translator herein after mentioned, in books to be kept by them for that purpose, on receiving from the parties at the rate of twelve and an half cents for every hundred words con-

tained in such written evidence of their claim. . . . And if such person shall neglect to deliver such notice in writing of his claim, together with a plat as aforesaid, or cause to be recorded such written evidence of same, all his right, so far as the same is derived from the two first sections of this act, shall become void, and for ever thereafter be barred; nor shall any incomplete grant, warrant, order of survey, deed of conveyance, or other written evidence, which shall not be recorded as above directed, ever after be considered or admitted as evidence in any court of the United States. . . .

Sec. 5. . . . Each board, or a majority of each board, shall, in their respective districts, have power to hear and decide in a summary manner, all matters respecting such claims, also to administer oaths, to compel the attendance of, and examine witnesses, and such other testimony as may be adduced, to demand and obtain from the proper officer and officers, all public records, in which grants of land, warrants, or orders of survey, or any other evidence of claims to land, derived from either the French or Spanish Governments may have been recorded; to take transcripts of such record or records, or any part thereof; to have access to all other records of a public nature, relative to the granting, sale, transfer, or titles of lands, within their respective districts;

and to decide in a summary way, according to justice and equity, on all claims filed with the register or recorder, in conformity with the provisions of this act. . . .

Act of Congress, February 28, 1806
(2 Stat. 352)

An Act extending the powers of the Surveyor-general to the territory of Louisiana; and for other purposes.

* * *

Sec. 3. And be it further enacted, That so much of the act, intituled "An act for ascertaining and adjusting the titles and claims to land within the territory of Orleans and the district of Louisiana," as makes it the duty of every claimant to lands, within the territory of Louisiana, to deliver to the recorder of land titles a plot of the tract or tracts, claimed by him, be, and the same is hereby repealed, so far as relates to claimants whose tracts had not been surveyed by the proper officer, under the Spanish government, prior to the twentieth day of December, one thousand eight hundred and three. And the commissioners appointed for ascertaining the titles and claims to lands, within either the territory of Louisiana, or that of Orleans, are hereby authorized to direct the officer exercising the powers of surveyor-general, within the

same, to execute such surveys as they may think necessary, for the purpose of deciding on claims presented for their decision: Provided, that the expense of executing such surveys shall be defrayed by the parties claiming the land, unless the same be claimed by a legal French or Spanish grant, made and completed before the first day of October, one thousand eight hundred: And provided also, and it is hereby further enacted, that every such survey, as well as every other survey, by whatever authority heretofore executed, those of the above-mentioned legal and complete titles only excepted, shall be held and considered as private surveys only; and all the tracts of land, the titles to which may be ultimately confirmed by Congress, in conformity with the provisions of the act above mentioned, shall, prior to the issuing of patents, be re-surveyed, if judged necessary, under the authority of the person exercising the powers of surveyor-general, and at the expense of the parties.

Act of Congress, April 21, 1806
(2 Stat. 391)

An Act supplementary to an act intituled "An act for ascertaining and adjusting the titles and claims to land, within the territory of Orleans, and the district of Louisiana."

Be it enacted by the Senate and House of Representatives of the United

States of America in Congress assembled, That every person or persons claiming a tract of land, by virtue of the second section of the act, to which this act is a supplement, and who had commenced an actual settlement on such tract, prior to the first day of October, one thousand eight hundred, and had continued actually to inhabit and cultivate the same, during the term of three years from the time when such actual settlement had commenced, and prior to the twentieth day of December, eighteen hundred and three, shall be considered as having made such settlement with the permission of the proper Spanish officer, although it may not be in the power of such person or persons to produce sufficient evidence of such permission.

Act of Congress, April 25, 1812
(2 Stat. 713)

An Act for ascertaining the titles and claims to Lands in that part of the Louisiana which lies east of the river Mississippi and island of New Orleans.

* * *

Sec. 5. And be it further enacted, That the said commissioners shall have power, in their respective districts, to inquire into the justice and validity of the claims filed with them as aforesaid: it shall be their duty to ascertain in every case, whether the lands claimed

have been inhabited and cultivated; at what time such inhabitation and cultivation commenced; when surveyed, and by whom and what authority; and into every other matter respecting the claims which may affect the justice and validity thereof; and for that purpose shall have power to administer oaths, and to compel the attendance of, and examine witnesses and such other testimony as may be adduced; to have access to all records of a public nature, relative to the granting, sale, transfer or titles of lands within their respective districts, and to take transcripts from such record or records or any part thereof; and the evidence thus adduced and obtained shall, by the clerk, be entered in a book to be kept for that purpose.

Act of Congress, May 11, 1820
(3 Stat. 573)

An Act supplementary to the several acts for the adjustment of land claims in the state of Louisiana.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the claims for lands within the eastern district of the state of Louisiana, described by the register and receiver of the said district, in their report to the commissioner of the general land office, bearing date the twentieth day of November, one

thousand eight hundred and sixteen, and recommended in the said report for confirmation, be, and the same are hereby, confirmed against any claim on the part of the United States.

Sec. 2. And be it further enacted, That any person or persons, claiming lands within that part of Louisiana lying west of the river Mississippi, including the island of New Orleans, founded upon any Spanish grant, concession, or order of survey, and whose claims have not heretofore been filed in the proper office, may, from and after the first day of July next, and until the thirty-first day of December thereafter, deliver notices, in writing, and the written evidences, of their claims, to the register of the land district within which such lands may be situate, within the said state, and the said notices and evidences, so delivered, within the time limited by this act, shall, by the said registers, be recorded, in books to be kept for that purpose; for which service a compensation shall be received, from such claimants at the rate of twenty-five cents for every hundred words. And the rights of such persons as shall neglect so doing, within the time limited by this act, shall, so far as they are derived from, or founded on, any act of Congress, ever after be barred, and become void, and the evidences of their claims never after admitted as evidence in any court of the United States,

against any grant derived from the United States.

* * *

Sec. 4. And be it further enacted, That every person or persons, claiming lands within that part of Louisiana described in the preceding section, founded upon any Spanish grant, concession, or order of survey, who had filed their notices of claims in the proper office, according to former laws, and whose claims have not been confirmed, may, at any time before the thirty-first day of December next, deliver additional written evidence, or other testimony, in support of their claims, the notice of which had been filed as aforesaid, to the said registers; and the evidence, so delivered, or offered, shall be recorded in books to be kept for that purpose; for which service a compensation shall be received, from such claimants, at the rate of twenty-five cents for every hundred words. And the rights of such persons as shall neglect so doing within the time limited by this act, shall, so far as they are derived from, or founded on, any act of Congress, every after be barred, and become void, and the evidences of their claims never after admitted as evidence in any court of the United States, against any grant derived from the United States.

Sec. 5. And be it further enacted, That the said registers shall, on the first day of January next, make, to the Secretary of the Treasury, a report of the claims in which additional evidences shall have been filed in their respective offices, together with the substance of the evidence so filed, with their opinion of the credit to which such evidence is entitled, and such other information as the examination of such cases, under any former law, may have placed in their power or possession.

Sec. 6. And be it further enacted, That it shall be the duty of the Secretary of the Treasury, as soon as the reports of the said registers shall be received, to proceed to the examination of the claims aforesaid, and to report to the two houses of Congress a list of the cases, which, in his opinion, ought to be confirmed, together with the reasons upon which his opinion may be founded: Provided, nevertheless, That no claim shall be so recommended for confirmation, which contains more than the quantity contained in a league square.

Act of Congress No. 17, January 12, 1825
(4 Stat. 80)

An Act authorizing repayment for land erroneously sold by the United States.

Be it enacted by the Senate and House of Representatives of the United

States of America, in Congress assembled, That every person, or the legal representative of every person, who is or may be a purchaser of a tract of land from the United States, the purchase whereof is or may be void, by reason of a prior sale thereof by the United States, or by the confirmation or other legal establishment of a prior British, French or Spanish grant thereof, or for want of title thereto in the United States, from any other cause whatsoever, shall be entitled to repayment of any sum or sums of money paid for or on account of such tract of land, on making proof, to the satisfaction of the Secretary of the Treasury, that the same was erroneously sold, in manner aforesaid by the United States, who is hereby authorized and required to repay such sum or sums of money paid as aforesaid.

Act of Congress No. 817, February 6, 1835 (4 Stat. 749)

No. 817--An Act for the final adjustment of claims to lands in the State of Louisiana.

Be it enacted, That any person or persons having claims to lands in the State of Louisiana, whose claims have been recognised by former laws as valid, but which have not heretofore been confirmed to the grantees or their legal representatives, be, and they are hereby, authorized to present their claims to the register and receiver of the land office

in which the land may lie, within two years from the passage of this act, together with the written and other testimony in support of the same, and it shall be the duty of the register and receiver to record in a book to be kept by them for that purpose, the notice of every claim so preferred, together with the evidence in support of the same; and the said register and receiver are hereby further authorized to receive any evidence for and on behalf of other individuals who may resist the confirmation of any such claim either on their own behalf, or that of the United States, and cause to be taken any evidence which shall be deemed necessary and proper by them to have such claim properly and justly settled, and to have the same likewise recorded in said book, for which service, in recording the applicant's title-papers and evidence, they shall be entitled to receive from said applicant at the rate of twenty-five cents for every hundred words.

Sec. 2. And be it further enacted, That it shall be the duty of the registers and receivers of the land offices, at or before the beginning of each session of Congress thereafter, to make to the Secretary of the Treasury a report of the claims which may have been presented before them, together with the testimony, accompanied by their opinions of the validity of each claim, and such other information respecting them as

may be in their possession, which said report shall, by the Secretary of the Treasury, be laid before Congress as soon as practicable, with the opinion of the Commissioner of the General Land Office, touching the validity of the respective claims.

Act of Congress No. 852, July 6, 1842
(5 Stat. 491)

An Act confirming certain land claims in Louisiana.

Be it enacted, That the claims to lands within the land district of New Orleans, being numbers six, seven, eight, nine, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, thirty, thirty-four, thirty-five, thirty-eight, forty-seven, forty-eight, fifty-seven, fifty-nine, sixty, sixty-one, and sixty-two, of the two reports of the register and receiver of said land district, dated fourteenth of December, eighteen hundred and thirty-six, and second of November, eighteen hundred and thirty-seven, and made under the provisions of the act of the sixth of February, eighteen hundred and thirty-five, entitled "An act for the final adjustment of claims to lands in the State of Louisiana," be, and the same are hereby, confirmed: Provided, always, That this is only to operate as a quit-claim on the part of the United States.

* * *

Sec. 4. And be it further enacted, That numbers one, four, seven, fifteen, eighteen, twenty, twenty-three, twenty-nine, thirty, thirty-one, thirty-seven and forty-eight of said report, are also confirmed, as recommended by the register and receiver; number three, is confirmed to two thousand acres, number twenty-four to one thousand acres, and number forty-five to two hundred acres: Provided, That this act shall amount only to a relinquishment on the part of the United States, and shall in no manner affect the rights of third persons, and, on the presentation to the Commissioner of the General Land Office of a plat of survey duly approved by the surveyor-general of the State of Louisiana, the Claimant shall be entitled to a patent.

Act of Congress, June 2, 1858
(11 Stat. 249)

An Act to provide for the Location of certain confirmed Private Land Claims in the State of Missouri, and for other Purposes.

* * *

Sec. 3. . . . in all cases of confirmation by this act, or where any private land claim has been confirmed by Congress, and the same, in whole or in part, has not been located or satisfied, either for want of a specific location prior to such confirmation, or for any

reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor-general of the district in which such claim was situated, upon satisfactory proof that such claim has been so confirmed, and that the same, in whole or in part, remains unsatisfied, to issue to the claimant, or his legal representatives, a certificate of location for a quantity of land equal to that so confirmed and unsatisfied. . . .

Act of Congress, February 28, 1859
(11 Stat. 387)

An Act to amend an Act entitled "An Act authorizing Repayment for Land erroneously sold by the United States."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act of Congress "authorizing repayment for lands erroneously sold by the United States," approved January twelfth, eighteen hundred and twenty-five, be, and the same is hereby amended, so as to authorize the Secretary of the Interior, upon proof being made to his satisfaction, that any tract of land has been erroneously sold by the United States, so that from any cause whatever, the sale cannot be confirmed, to repay to the purchaser or purchasers, or to the legal

representatives or assignees of the purchaser or purchasers thereof, the sum or sums of money, which may have been paid therefor, out of any money in the treasury not otherwise appropriated.

Sec. 2. [And] be it further enacted, That, whenever any tract of land has been erroneously sold, as aforesaid, and the sum or sums of money which may have been paid for the same, shall have been invested in any stocks held in trust, or shall have been paid into the treasury of the United States, to the credit of any trust fund, it shall be lawful by the sale of such portion of the said stocks as may be necessary for that purpose, or out of said trust fund, for repayment of the purchase-money to be made to the parties entitled thereto.

Respectfully submitted,

JOHN H. BROOKS
847 3rd Street
Gretna, Louisiana 70053
(504)362-6272

PETER C. LADART
1112 Fifth Street
Gretna, Louisiana 70053
(504)361-5741

BARHAM & CHURCHILL
MACK E. BARHAM
A Professional Law Corporation
400 Lafayette Street, Suite 300
New Orleans, Louisiana 70130
(504)523-3565

ATTORNEYS FOR PLAINTIFFS-PETITIONERS

Supreme Court, U.S.
FILED
JAN 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1137

In the Supreme Court of the United States

OCTOBER TERM, 1985

SUCCESSION OF HUBERT BURAT (BURAS),
Plaintiff-Appellants

versus

THE BOARD OF LEVEE COMMISSIONERS
OF THE ORLEANS LEVEE DISTRICT
OF THE STATE OF LOUISIANA, ET AL.,
Defendants-Appellees

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF LOUISIANA

MOTION TO DISMISS

RICHARD J. McGINITY
BALDWIN & HASPEL
225 Baronne Street - 24th Floor
New Orleans, Louisiana 70112
Telephone: (504) 581-1711

Attorney for Defendant
THE BOARD OF LEVEE
COMMISSIONERS OF
THE ORLEANS LEVEE
DISTRICT

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

H. H. HILLYER, JR.
WILSON S. SHIRLEY, JR.
M. HAMPTON CARVER,
COUNSEL OF RECORD
MILLING, BENSON,
WOODWARD, HILLYER,
PIERSON & MILLER
1100 Whitney Building
New Orleans, Louisiana 70130
Telephone: (504) 581-3333

Attorneys for Defendants
CHEVRON U.S.A. INC. and
CHEVRON PIPE LINE
COMPANY

JOHN E. BAILEY
DAVID R. STEVENSON
GULF REFINING COMPANY
P.O. Box 3725
Houston, Texas 77253
Telephone: (713) 754-9873

Attorneys for Defendant
GULF REFINING COMPANY

J. WAYNE ANDERSON
MONROE & LEMANN
1424 Whitney Building
New Orleans, Louisiana 70130
Telephone: (504) 586-1900

Attorney for Defendant
LOUISIANA POWER &
LIGHT COMPANY

J. WAYNE ANDERSON
MONROE & LEMANN
1424 Whitney Building
New Orleans, Louisiana 70130
Telephone: (504) 586-1900

Attorney for Defendant
LOUISIANA POWER &
LIGHT COMPANY

JANE C. BURGER
P. O. Box 60193
New Orleans, Louisiana 70160
Telephone: (504) 588-4088

Attorney for Defendant
Shell Oil Company

DAVID A. KERSTEIN
A PROFESSIONAL LAW
CORPORATION
902 Whitney Building
New Orleans, Louisiana 70130
Telephone: (504) 525-7144

Attorney for Defendants
ESTATE OF WILLIAM G.
HELIS and HELIS
ENTERPRISES, INC.

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NO. 85-1137
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

SUCCESSION OF HUBERT BURAT (BURAS),
Plaintiffs-Appellants

versus

THE BOARD OF LEVEE COMMISSIONERS
OF THE ORLEANS LEVEE DISTRICT
OF THE STATE OF LOUISIANA, ET AL.,
Defendants-Appelees

MOTION TO DISMISS

Appellees,[1] pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the appeal herein be dismissed for want of appellate jurisdiction, for failure to comply with Rule 15 of the Supreme Court of the United States, because the Federal questions sought to be raised are unsubstantial; and because the judgment below rests on adequate non-federal grounds.

STATEMENT OF THE CASE

The heirs of Hubert Burat, out of possession for over

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[1] The Board of Levee Commissioners of the Orleans Levee District of the State of Louisiana; Chevron U.S.A. Inc. (Parent - Chevron Corporation), Chevron Pipe Line Company; Gulf Refining Company; Louisiana Power & Light Company (Parent - Middle South Utilities, Inc.; Subsidiaries and/or Affiliates - Arkansas Power & Light Company; Mississippi Power & Light Company; New Orleans Public Service, Inc.; Middle South Energy, Inc.; Middle South Services, Inc.; System Fuels, Inc.; Electec); Shell Oil Company (Subsidiaries - Shell California Production, Inc.; Shell Offshore, Inc.; Shell Western E&P, Inc.); and Estate of William G. Helis, and Helis Enterprises, Inc.

100 years, brought this petitory action, which is the Louisiana civil law equivalent of the common law action in ejectment, seeking to be declared owners of certain lands on the left (east) bank of the Mississippi River. Since well before 1925, the lands have been in possession of defendants or their ancestors in title. In 1925, the Board of Commissioners of the Orleans Levee District, for use as a spillway, purchased or expropriated the lands from the persons then in possession thereof. These persons were not in privity with the Burats.

The Trial Court, after a lengthy evidentiary hearing, sustained a defense of acquisitive prescription, holding that the title of the Burats had been divested by the adverse possession (for over 30 years) exercised by defendants and their ancestors in title. Opinion at Appendix to Original Petition (hereinafter the "Appendix"), Vol. II, p. 24. The Court of Appeal affirmed, holding that the Levee Board, by a series of deeds and judgments of expropriation, had acquired in the aggregate all of the property claimed by the Burats and that the Burat claims had been extinguished by the adverse possessions of defendants and their predecessors. *Succession of Burat (Buras) v. The Board of Levee Commissioners, et al.*, 469 So.2d 1022 (La. App. 4th Cir. 1985), Appendix, Vol. II, p. 1, *reh'g denied*, Appendix, Vol. II, p. 35.

The Court of Appeal, like the Trial Court, held that the title had passed out of the United States at least by 1842 when the Congress confirmed the claim of Hubert Burat. *Id.*

The Louisiana Supreme Court denied certiorari. *Succession of Hubert Burat v. Board of Levee Commissioners, et al.*, 475 So.2d 1095 (La. 1985), Appendix, Vol. II, p. 36.

ARGUMENT

1. The Jurisdictional Statement ("Petition") herein does not comply with Rule 15 of this Court. It does not even cite the state statute the constitutionality of which is claimed to have been sustained against Appellants' constitutional attack; much less does it quote same verbatim. Rule 15(f). It does not show the stage in the proceedings at which the questions sought to be reviewed were raised nor the manner of raising them. Rule 15(g). Nor does it give any adequate explanation of the reasons why the questions presented are so substantial as to require plenary consideration. Rule 15(h).

There is no showing that the validity of any particular state statute was sustained as against federal constitutional attack. Rather, it appears that the Appellants' complaint is that the adverse decisions below amounted to a denial of assertions of federal rights rather than a validation of a state statute. *Cf. Mergenthaler Linotype Co. v. Davis,* 251 U.S. 256, 259 (1920); *Hanson v. Denckla,* 357 U.S. 235, 254 (1958).

In short, there is no showing sufficient to warrant the exercise of this Court's appellate jurisdiction.

2. The keystone of the Appellants' argument is that the title did not emanate from the Federal government until 1972 when the belated United States patent was issued to Hubert Burat. Unless Appellants are correct in this contention, their whole case must fall; and no other federal question sought to be raised would be material or substantial. Yet, this very issue has long been foreclosed and is itself unsubstantial.

This lack of substance is highlighted in the prior federal proceedings herein. The Burats first filed this suit

in the United States District Court for the Eastern District of Louisiana. The District Court rejected their claim that the question when title came out of the United States presented a substantial federal question and dismissed the matter for lack of jurisdiction, saying:

> "[T]he Supreme Court has so often held that title to land passes out of the United States upon confirmation by Act of Congress, not upon subsequent issuance of the patent that the question is no longer open to discussion. *McGilvra v. Ross*, 215 U.S. 70, 54 L.Ed. 95 (1909); *Langdeau v. Hanes*, 88 U.S. 521, 22 L.Ed. 606 (1875); *Grignon v. Astor*, 2 How. 319, 11 L.Ed. 283 (1844); *Joplin v. Chachere*, 192 U.S. 94, 48 L.Ed 359 (1904); *McNee v. Donahue*, 142 U.S. 587, 35 L.Ed 1122 (1892); *Gouner v. Polmer*, 156 F.2d 207 (5th Cir. 1946); *Sanchez v. Deering*, 298 F. 286 (5th Cir. 1924), *aff.* 270 U.S. 227, 70 L.Ed. 556 (1926)." (Emphasis added)(copy attached, p. A-1 hereof).

The Fifth Circuit affirmed. *Heirs of Burat (Buras) et al. v. Board of Levee Commissioners of Orleans Levee District of State of Louisiana, et al.*, 496 F.2d 1336 (5th Cir. 1974), *reh'g denied.* The Court said:

> "The District Court, with a good statement of reasons, dismissed the complaint for lack of federal jurisdiction of the subject matter. We affirm." 496 F.2d at 1337.

Continuing, the Fifth Circuit said:

> "That land title and possessory actions are normally not the business of federal courts is not

> questioned by plaintiffs and is such a firm concept that it needs no amplifications. *See, e.g.*, Beauregard v. New Orleans, 59 U.S. (18 How.) 497, 15 L.Ed. 469 (1855); White v. Burnley, 61 U.S. (20 How.) 235, 15 L.Ed. 886 (1857); Mays v. Kirk, 414 F.2d 131 (5th Cir. 1969); *cf.* **Aaron v. Florida Gas Transmission Co.**, 412 F.2d 802 (5th Cir. 1969)." 496 F.2d at 1338.

The Court denied certiorari. *Heirs of Burat (Buras), et al. v. Board of Levee Commissioners of Orleans Levee Disrict of State of Louisiana, et al.*, 419 U.S. 1049 (1974).

3. The question sought to be raised as to the right of a sovereign to acquire property by adverse possession, even though prescription could not run against the sovereign, has been foreclosed since 1893 by the decision of this Court in *Stanley v. Schwalby*, 147 U.S. 508 (1893).

There seems to be no reason why a state may not confer immunity from acquisitive prescription upon a state agency, such as a levee board, without depriving any citizen of equal protection. If it is not unconstitutional for the state to be so treated, there is no reason why similar treatment of its agency should suffer from constitutional infirmity.

4. The judgment below rests on adequate non-federal grounds. The Appellants apparently argue that, regardless of when title came out of the United States, the Levee Board could not acquire by adverse possession. The Appellants do not question that private persons could do so. The State Court held that the title of the Burats had been divested and acquired by private persons long before the Levee Board acquired the land. Hence, defendants would prevail regardless of whether a public body could constitutionally acquire by adverse possession.

5. There is no real or conceptual conflict between the Louisiana decision herein and that of the Supreme Court of Alaska in *Ault v. State of Alaska*, 688 P.2d 951 (1984). In *Ault*, the Supreme Court of Alaska reversed a summary judgment on the grounds that questions of fact presented by the case made it inappropriate for summary judgment. Because of what it called "tension" between the state's ability to acquire land by adverse possession and its inability to expropriate or otherwise "take" without just compensation, it was necessary that the Court "narrowly construe the circumstances under which the state may acquire property by adverse possession." *Id.*, at p. 956. This is not a holding that a sovereign may not acquire by adverse possession; it is merely an admonition of the care that should be taken as to the niceties of state law in such an exercise. Here, after extensive evidentiary hearings on the exceptions, and careful consideration by the District Court, the Court of Appeal, and the Supreme Court of Louisiana, the right of the state agency under state law to the acquisition of the property was maintained; thus giving the Louisiana Courts an opportunity to "narrowly construe" the circumstances in question.

6. This is not a case which is likely to recur or to have broad effect, nor is it one which the Court should consider as important for any other reason. At this late date, over 180 years after the Louisiana Purchase, problems related to titles arising under the Spanish sovereignty of Louisiana are not likely to recur and, in any event, the rules of law respecting these titles were settled long ago. The United States does not assert any title to the land involved in this suit and could not have asserted same as against these heirs since 1842. Indeed, the decision of the Interior Department, which in 1972 directed that a patent issue to

Burat, explicitly stated:[2]

> "[T]he United States has no claim because of the confirmation of the Burat claim..."

It should also be remembered that the 1972 patent contains the following language:[3]

> "This patent shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interefere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land."

CONCLUSION

It is respectfully submitted, therefore, that the Appellants have failed to show that this Court has appellate jurisdiction of this case; have failed to show that there is any substantial question for decision by this Court, or that such a question was properly raised. The judgment below rests on adequate non-federal grounds. Accordingly, the appeal should be dismissed and no writ should be granted.

Respectully submitted,

RICHARD J. McGINITY
BALDWIN & HASPEL
225 Baronne Street - 24th Floor

---

[2] Found in record as App. D-4, Item 12. Copy attached p. A-5

[3] Found in record as App. D-4, Item 13. Copy attached p. A-11

New Orleans, Louisiana 70112
Telephone: (504) 581-1711

By:_____
Attorney for Defendant
THE BOARD OF LEVEE
COMMISSIONERS OF
THE ORLEANS LEVEE
DISTRICT

H. H. HILLYER, JR.
WILSON S. SHIRLEY, JR.
M. HAMPTON CARVER,
COUNSEL OF RECORD
MILLING, BENSON,
WOODWARD, HILLYER,
PIERSON & MILLER
1100 Whitney Building
New Orleans, Louisiana 70130
Telephone: (504) 581-3333

By:_____
Attorneys for Defendants
CHEVRON U.S.A. INC. and
CHEVRON PIPE LINE
COMPANY

JOHN E. BAILEY
DAVID R. STEVENSON
GULF REFINING COMPANY
P.O. Box 3725
Houston, Texas 77253
Telephone: (713) 754-9873

By:_____
Attorneys for Defendant
GULF REFINING COMPANY

JANE C. BURGER
P. O. Box 60193
New Orleans, Louisiana 70160
Telephone: (504) 588-4088

Attorney for Defendant
SHELL OIL COMPANY

J. WAYNE ANDERSON
MONROE & LEMANN
1424 Whitney Building
New Orleans, Louisiana 70130
Telephone: (504) 586-1900

Attorney for Defendant
LOUISIANA POWER &
LIGHT COMPANY

DAVID A. KERSTEIN
A PROFESSIONAL LAW
CORPORATION
902 Whitney Building
New Orleans, Louisiana 70130
Telephone: (504) 525-7144

Attorney for Defendants
ESTATE OF WILIAM G.
HELIS and HELIS
ENTERPRISES, INC.

APPENDIX A

Minute Entry
April 23, 1973
Cassibry, J.

CIVIL ACTION
NO. 72-1798
SECTION "E"

HEIRS OF HUBERT BURAT (BURAS)
versus
BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT OF THE STATE OF LOUISIANA; LOUISIANA WILDLIFE & FISHERIES COMMISSION; GULF REFINING CO.; STANDARD OIL OF CALIFORNIA; SHELL OIL CO.; ESTATE OF WILLIAM G. HELIS, his heirs and assigns; CHEVRON OIL CO.; LOUISIANA POWER & LIGHT CO., (formerly known as PEOPLES UTILITIES, INC.); and PHILIP A. GROVE

This cause came on for hearing on September 27, 1972 on motions to dismiss for lack of federal jurisdiction, filed on behalf of defendants Board of Levee Commissioners of the Orleans Levee District of the State of Louisiana, Gulf Refining Company, Shell Oil Company, Estate of William G. Helis, his heirs and assigns, Louisiana Power & Light Company (formerly known as Peoples Utilities, Inc.) and Philip A. Grove and Chevron Oil Company, was argued and submitted.

After due consideration thereof IT IS ORDERED, ADJUDGED AND DECREED that defendants motions be, and they are hereby, GRANTED.

/s/ Fred J. Cassibry
UNITED STATES DISTRICT JUDGE

REASONS

This non-diversity action involves the title to certain land in Plaquemines Parish, Louisiana. The defendants moved to dismiss for failure of the complaint to state the existence of a federal question. This Court has closely examined the question and has concluded that this case does not arise under the Constitution, laws, or treaties of the United States within the meaning of 28 U.S.C.A. §1331.

Plaintiffs request judgment declaring (a) that they, as a class representing the heirs of Hubert Burat, recieved good title to the lands from the United States by patent dated May 24, 1972, retroactive to July 6, 1842, the date of the Act of Congress confirming the private claim of Hubert Burat, pursuant to which the patent issued; and (b) that the Act and/or Acts of Expropriation against the land by defendant, the Board of Levee Commissioners of the Orleans Levee District, were in violation of the Constitution of the United States.

The complaint does not specify the federal question relied upon for jurisdiction; therefore, the Court has examined all allegations which might be considered as such. These allegations in summary are: (1) that plaintiffs' title to the lands derived from a United States Patent issued on May 24, 1972 pursuant to a private claim confirmed by Act of Congress on July 6, 1842; (2) that the United States was the owner of the lands during the interim, but the patent had retroactive effect to the date of confirmation, and (3) that the Board of Levee Commissioners wrongfully assumed ownership of the lands by various acts of expropriation during the period 1924 through 1930 in excess of its authority and in violation of the Constitution of the United States.

As to the first possible basis, the fact that title comes from a patent or under an Act of Congress does not show a federal question. *Joy v. St. Louis,* 201 U.S. 332, 50 L.Ed. 776 (1906); *Florida Central & Peninsular Railroad Co. v. Bell,* 176 U.S. 321, 44 L.Ed. 486 (1900); *Shulthis v. McDougal,* 225 U.S. 561, 56 L.Ed. 1205 (1912); *Kirklin v. Ellerbe,* 278 F. 168 (5th Cir. 1922).

As to the second, the Supreme Court has so often held that title to land passes out of the United States upon confirmation by Act of Congress, not upon subsequent issuance of the patent that the question is no longer upon to discussion. *McGilvra v. Ross,* 215 U.S 70, 54 L.Ed 95 (1909); *Langdeau v. Hanes,* 88 U.S. 521, 22 L.Ed. 606 (1875); *Grignon v. Astor,* 2 How. 319, 11 L.Ed 283 (1844); *Joplin v. Chachere,* 192 U.S. 94, 48 L.Ed. 359 (1904); *McNee v. Donahue,* 142 U.S. 587, 35 L.Ed. 1122 (1892); *Gouner v. Polmer,* 156 F.2d 207 (5th Cir. 1946); *Sanchez v. Deering,* 298 F. 286 (5th Cir. 1924), *aff.* 270 U.S. 227, 70 L.ed. 556.

The allegations with respect to the unconstitutional expropriation, forming the third possible basis, are not essential to plaintiffs' cause of action. This is a petitory action, similar to the common law action at law in ejectment, in which the essential allegations are that the plaintiffs have title to the lands in possession of the defendants. Allegations regarding expropriation are matters of defense. For the purpose of creating federal question jurisdiction, plaintiffs may not anticipate defenses by alleging more than the essential allegations of a well pleaded complaint. *Gully v. First National Bank,* 299 U.S. 109, 81 L.Ed. 70 (1936). *Taylor v. Anderson,* 234 U.S. 74, 58 L.Ed. 1218 (1918); *Huckins v. Duval County, Florida,* 286 F.2d at 49 (5th Cir. 1960); *Joy v. City of St. Louis, supra,*

Mays v. Kirk, 414 F.2d 131, 132 (5th Cir. 1969), 1 Moore Fed. Practice, §0.60 (8-3), p. 632.

The fact that plaintiffs ask for declaratory and injunctive relief does not change their cause of action so as to confer federal jurisdiction where it would not otherwise exist. *White v. Sparkill Realty Corporation*, 280 U.S. 500, 74 L.Ed. 578 (1930); *Urban Renewal Authority for City of Trinidad v. Daughtery*, 271 F.Supp. 729 (Colorado 1967); *Lang v. Colonial Pipeline Company*, 266 F.Supp. 552 (E.D. Penn. 1967), 2 Moore Fed. Practice, §2.07(3), pp. 404-405. The claim for damages is entirely dependent upon the claim of ownership and, of course, must also be dismissed for lack of jurisdiction. *See Tircuit v. Burton-Swartz Cypress Co.*, 162 La. 319, 110 So. 489 (1926), *Florida Central & Peninsular Railroad Co. v. Bell*, and others cases cited above.

In addition to the complaint the Court has also considered the contentions presented by the plaintiffs in memorandum brief and in oral argument to determine whether plaintiffs can, by amending their pleadings, state a case arising under the Constitution, laws or treaties of the United States, within the meaning of 28 U.S.C.A. §1331. For one or more of the reasons assigned above, the court is of the opinion that the jurisdictional defect in plaintiffs' complaint cannot be cured by amendment.

Accordingly, let judgment be entered herein, dismissing plaintiffs' suit for lack of jurisdiction.

APPENDIX B

United States Department of the Interior
Bureau of Land Management
Washington, D.C. 20240

(May 23 1972, stamped)
Memorandum

To: Eastern States Land Office
From Chief, Division of Lands and Realty
Subject: Patent for Private Land Claim

By letter of January 31, 1972, Peter C. La Dart, attorney for the Succession of Hubert Burat, filed application for the issuance of a patent for secs. 29, 30, 31, and 32, T. 19 S., R. 16 E., St. Helena Meridian, Louisiana. The land is represented on the Bureau records as the private land claim of Hubert Burat.

Section 14 of the Act of March 26, 1804 (2 Stat. 283) provided for the recognition of bona fide grants for lands actually settled on by persons claiming title thereto, if such settlement was made prior to December 20, 1803. Section 2 of the Act of March 2, 1805 (2 Stat. 324) provided for the donation to the occupants of tracts settled on, using the phrase "shall be granted." The 1805 Act also provided for the recording and examination of the claims and the presentation of them to the Congress. These acts were supplemented several times up to the Act of February 6, 1835 (4 Stat. 749) which gave a "last" chance to present claims under all the preceding claim acts.

Pursuant to the Act of February 6, 1835 (4 Stat. 749), the Register and Receiver at New Orleans, acting as Com-

missioners for private claims, listed the claim of Hubert Burat as No 60 in Class "B" of their report of November 22, 1837 ("K" Volume 90, at the National Archives). The report stated that the claim was based on occupation and cultivation of the land on December 20, 1803, and for eight years prior thereto. The Burat claim was confirmed by Section 1 of the Act of July 6, 1842 (5 Stat. 491). The 1842 Act provides that the confirmation shall be a quitclaim of the interests of the United States.

The Burat claim was duly surveyed and is shown on the township plat of survey approved on October 24, 1854, and on the particular plat of survey of the claim, approved October 24, 1885, as covering secs. 29, 30, 31, and 32, T. 19 S., R. 16 E., St. Helena Meridian, Louisiana, containing a total of 707.46 acres. The claim having been confirmed and surveyed in place, the equitable title to the lands included therein passed from the United States and this office would have no jurisdiction over any further disposal of the land or any interests therein, except the ministerial duty of issuing a patent therefor in accordance with the confirmation by the Congress, upon a proper request made for that purpose.

Bureau records show that the lands in the claim were purchased by various parties under four cash entries, Nos. 1285, 1286, 1290, and 1291, New Orleans series. Patents for these entries were issued to Andrew Hodge, Jr., assignee, on November 5, 1839, for No. 1285, and on December 11, 1838, for the three other entries, patents recorded in Bureau patent record volume 1, at pages 445, 223, 224, and 225, respectively. The assignments to Hodge were legal under the then existing laws.

Subsequently, H. F. Deblieu, attorney for the residuary legatees of Andrew Hodge, Jr., applied for repay-

ment where a purchase is "void" by reason of a prior sale by the United Staes, by confirmation of a French, British, or Spanish grant or for want of title in the United States from other cause. The Secretary of the Interior approved the request for repayment on March 30, 1861, for these and other entries included in the repayment application. By letter of April 2, 1861, the Commissioner of the General Land Office referred the case to the First Comptroller of the Treasury for payment. Evidence is of record showing the money was paid as requested. In connection with the request for repayment, secs. 29 and 32, among other lands, were deeded to the United Staes by H. F. Deblieux, attorney for Ledyard Hodge and Andrew Hodge Sands, residuary legatees of Andrew Hodge, Jr., by deed dated January 25, 1861, and recorded as Act No. 2064 in Book 14 of Conveyances, at page 21, records of Plaquemines Parish, Louisiana. The approval of and the repayment were an adjudication that the purchases as to secs. 29 and 32 were "void" within the meaning of the 1825 Act, *supra*. The adjudication was made by the authorized officers of the Government, has never been appealed, and no reason appears why it should not be held to be binding. The purchases with respect to secs. 29 and 32 having duly found to be void, any cloud on the Burat claim as to these tracts was eliminated and the claim was satisfied in place and title insured to Burat on secs. 29 and 32.

It should be noted that while no reconveyance has been shown as to secs. 30 and 31, the patents for these lands are, at least, voidable, because they were issued on December 11, 1838, a little over one year after the report had been made recommending confirmation of the Burat claim. Since the same parties, the Register and Receiver at New Orleans, acted both on the acceptance and approval of

the two cash entries and in making and submitting the report covering the Burat claim for the same lands, there was either error or oversight on their part in failing to recall the cash entries before patents were issued on them. However, because of the long lapse of time, and the possible involvement of third-party interests unknown to this office, no action will now be taken to effect any cancellation of Cash Entries 1290 and 1294 covering secs. 30 and 31.

On February 11, 1888, in the case of the *Succession of Hubert Buras or Burat,* No. 156, the 24th Judicial District Court appointed James Wilkinson, District Attorney, as Curator of the estate of the late Hubert Buras or Burat. The purpose of these proceedings was for the disposal of unadministered property of the decedent at the time of his death; that is, the right to the issuance of location certificates under Section 3 of the Act of June 2, 1858 (11 Stat. 294). These certificates were claimed on the ground that the United Staes had sold the lands included in the Burat claim. The certificates have since been located on other lands not of interest here. In 1888, it was not a prerequisite to the issuance of scrip that the "unsatisfied" claim be reconveyed or relinquished to the United States, and no such action was taken. In light of the aforementioned facts, the issuance of the scrip was erroneous. However, since title to the lands acquired with the use of these certificates is now in third parties, no action may now be taken with respect to the certificates or the land acquired thereunder.

Section 2447, Revised Statutes (43 U.S.C. 1151) provides for the issuance of patents on claims to land which had been confirmed by law, prior to December 22, 1854, which confirmation act made no provision for the issuance of a patent. However, such patents shall only "operate as

a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judical tribunal between adverse claimants to the same land."

Patent Certificate No. 166 was issued on October 30, 1885, by the Land Office at New Orleans for secs. 29, 30, 31, and 32, T. 19 S., R. 16 E., St. Helena Meridian, Louisiana, containing 707.46 acres, for the private land claim of Hubert Burat. In view of the reconveyance of sec. 29 and 32 to the United States, and the possible question as to the patents for secs. 30 and 31, to all which the United States has no claim because of the confirmation of the Burat claim, the official records should be properly cleared with respect to all four sections.

Accordingly, the following actions will be taken:

1. Make the following notation on the margin of the patents for secs. 29 and 32, without cancelling the patents:

"Reconveyed to the United States by H. F. Deblieux, attorney of Ledyard Hodge and Andrew Hodge Sands, legatees of Andrew Hodge, Jr.; recorded as Act No. 2064 in Book 14 of Conveyances, page 21, records of Plaquemines Parish, Louisiana. Purchase money refunded on Cash Entry 1285 and 1286. See Secretary's order March 31, 1861. Evidence filed in Cash Entry 1310."

2. Make the identical notation on the tract book alongside the entries for secs. 29 and 32.

3. Approve for patenting the Patent Certificate No. 166 described above, now in PLC Docket No. 664, Louisiana, filed with this record.

4. Issue a patent in the name of Hubert Burat (Buras) for secs. 29, 30, 31, and 32, T. 19 S., R. 16 E., St. Helena Meridian, Louisiana, containing 707.46 acres, according to the plat of survey approved October 24, 1854, and the particular plat of the claim approved on October 24, 1885. The patent should cite the confirmatory Act of July 6, 1842 (5 Stat. 491), and should contain the following clause:

"This patent shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interefere with any valid adverse right to the same land, nor by construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land."

5. After the patent has been issued on the Burat claim, the record of the four patents on Cash Entries 1285, 1286, 1290, and 1294, should be noted in the margin thereof as to the number and date of the Burat patent.

/s/ G. Bingham

APPENDIX C

Form 1860
(January 1965)
(formerly 4-1010)
Eastern States 10704

The United States of America,
To all to whom these presents shall come, Greeting:

WHEREAS, There is now deposited in the Bureau of Land Management, evidence whereby it appears that the Private Land claim of Hubert Burat (Buras), being Claim No. 60 of the Report of the Register and Receiver dated November 22, 1837 for land claims in Plaquemines Parish, was confirmed by Section 3 of the Act of July 6, 1842 (5 Stat. 491), and that the said claim has been regularly surveyed and described as follows:

St. Helena Meridian, Louisiana
T. 19 S., R. 16 E.,
Sec. 29, A11;
Sec. 30, A11;
Sec. 31, A11;
Sec. 32, A11.

The area described contains 707.46 acres, accordingg to the plat of survey approved October 24, 1854 and the particular plat of the claim approved October 24, 1885, on file in the Bureau of Land Management:

NOW KNOW YE, that the UNITED STATES OF AMERICA, in consideration of the premises, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT unto the said Hubert Burat (Buras), and to his heirs, the land above desribed; TO HAVE AND TO

HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said Hubert Burat (Buras), and to his heirs and assigns forever.

This patent shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land.

IN TESTIMONY WHEREOF, the undersigned authorized officer of the Bureau of Land Management in accordance with the provisions of the Act of June 17, 1948 (62 Stat. 476), has, in the name of the United States, caused these letters to be made Patent, and the Seal of the Bureau to be hereunto affixed.

GIVEN under my hand, in Silver Spring, Maryland the TWENTY-FOURTH day of MAY in the year of our Lord one thousand nine hundred and SEVENTY-TWO and of the Independence of the United States the one hundred and NINETY-SIXTH.

By /s/ illegible
Manager, Eastern States Land Office

[SEAL]

Patent Number 1242435